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No. _____

In the Supreme Court of the United States

LEXINGTON 76 AUTO TRUCK STOP,
a Kentucky corporation, et al.,
Petitioners,

v.

DOTTIE RENEE MCALPIN, as Administratrix of the Estate of Robert T. Mock and as a Shareholder on behalf of Appalachian Oil Company,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the rules promulgated by this Court in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 114 S. Ct. 1673 (1994), completely eliminate the district court's ancillary jurisdiction over the terms of settlement agreements not expressly incorporated into the district courts orders of dismissal. More narrowly, this case presents the issue of whether a district court with jurisdiction to enforce and to punish contempt of its own orders requiring the return of documents by the Plaintiffs to the Defendants in the action has ancillary jurisdiction to enforce the related terms of a settlement agreement (i) requiring the return of those documents and others, (ii) prohibiting future litigation based on the facts of the case (which facts would depend for their proof upon such documents, and (iii) requiring the payment of attorneys fees in the event of a breach of those conditions. Both the Settlement Agreement and the district court's earlier orders relate to the return of documents to the Defendants in the original action.

PARTIES TO THE PROCEEDING

Petitioners

Marie Mills, Administratrix of the Estate of Vance Mills; Jerry W. Garland, Executor of the Estate of Beckham Garland; Appalachian Oil Corporation, a Kentucky Corporation; G&M Oil Corporation, a Kentucky Corporation; and B&V Realty Corporation. The above corporate entities have no parent companies or non-wholly owned subsidiaries.

Respondent

Dottie Renee McAlpin, as Administratrix of the Estate of Robert T. Mock and as a Shareholder on behalf of Appalachian Oil Corporation.

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The several orders of the Federal District Court for the Eastern District of Kentucky are included in Appendices B at 36a - 39a; C at 40a - 42a; D at 43a - 46a; E at 47a - 51a; F at 52a - 61a; G at 62a - 65a; H at 66a - 68a; and I at 69a - 70a.

The Civil Minutes and Hearing Transcripts of the Federal District Court for the Eastern District of Kentucky are included in Appendix K at 76a - 78a and Appendices J at 71a - 75a and L at 79a - 82a, respectively.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on October 3, 2000. Petitioners filed a Motion to Stay Issuance of Mandate on October 23, 2000, which the Sixth Circuit Court of Appeals denied by Order filed on November 21, 2000. No petition for rehearing was filed in this action. This Petition for Writ of Certiorari is filed within 90 days of the October 3, 2000 Opinion of the United States Court of Appeals for the Sixth Circuit. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Supplemental Jurisdiction
28 U.S.C. § 1367 (a)

a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

STATEMENT OF THE CASE

This appeal concerns the ancillary jurisdiction of the United States District Court for the Eastern District of Kentucky. The issue presented is whether the district court has ancillary jurisdiction over the terms of a Settlement Agreement when the district court has reopened a case to enforce several orders it entered during the pendency and as part of dismissal of the action. The Settlement Agreement in issue contains terms consistent with several of the district court's orders regarding the return of certain documents to the Defendants. The Settlement Agreement also contains terms regarding the payment of attorney's fees and a covenant on the part of the Respondent and her spouse not to sue again based on the facts. These district court orders required the return of Petitioner's property, namely business and financial records and any copies thereof, which were wrongfully seized or created by a court-appointed receiver. At the time of the seizure and creation of such records by the receiver he was an officer of the court. Since this receiver's appointment was improperly procured, the orders which the Court sought to

enforce prevented the further aggravation and abuse of the court's power to appoint a receiver.

This case presents a forum for the this Court to clarify the meaning of the holding in Kokkonen v. Guardian Life Insurance Company of America, 114 S.Ct. 1673, 511 U.S. 375 (1994). Kokkonen has been cited some 490 times by the lower courts. (See Appendix N at 86a - 127a.) Yet, this Court has not re-visited its holdings in Kokkonen with regard to ancillary jurisdiction over settlement arguments since the decision was originally issued in 1994. In fact, the Sixth Circuit decision below has already been cited. (See York v. County of El Dorado, 119 F. Supp. 2d 1106 at 1108, (E.D. Cal. 2000.)

The holding of Kokkonen appears to be limited to the facts of the case as the Supreme Court noted that jurisdiction failed because:

1) The Kokkonen Petitioner merely filed a motion seeking "enforcement of the settlement agreement." Kokkonen at 378.

2) "[T]he **only** order (in the underlying action) was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement." Kokkonen at 380. (Emphasis added.)

Petitioners argue that Kokkonen's meaning was limited to its narrow facts. Petitioners concede that cases similar to the facts of Kokkonen predominate the decisions citing Kokkonen's authority. Thus, under the application of

Kokkonen to the facts most often presented, ancillary jurisdiction over settlement agreements does not exist. However, Kokkonen did not contemplate the strict interpretation the Sixth Circuit Court of Appeals attributed to its holding. The Sixth Circuit stated that it had joined other circuits in strictly applying the holding in Kokkonen. "Kokkonen precludes the district court from enforcing any provisions of the Settlement Agreement that were not expressly incorporated into an order entered while the case was still pending on the court's docket." (Appendix A at 21a.)

The strict interpretation adopted in this case strips the district courts of the ancillary jurisdiction needed to manage their proceedings and vindicate their authority.

In this case, the district court re-opened the action to enforce orders which governed the same res as the Settlement Agreement: corporate documents of AOC. Notwithstanding this, the Sixth Circuit adopted the strict interpretation even though Kokkonen addressed how a breach of an agreement became a violation of the dismissal order and, thus, jurisdiction could exist over both. In Kokkonen, the United States Supreme Court sought a connection between the settlement breach and the district court's dismissal order, but found that none existed. In this case, however, rather than search for a connection, the Sixth Circuit simply "joined with other circuits" in strictly applying Kokkonen.

Here, the Sixth Circuit stripped the district court of its jurisdiction to enforce the earlier settlement agreement, while it left the district court with jurisdiction to enforce its several orders which had been violated. The subject matter of the terms of the orders and the terms of the Settlement Agreement sought to be enforced in some instances are identical and in

other cases are so closely related that any attempt at separating them is nearly impossible. Notwithstanding this, the Sixth Circuit has taken an overly restrictive interpretation of Kokkonen and announced that position as follows:

> [b]ecause this court has joined other circuits in strictly applying Kokkonen's relatively narrow interpretation of the district court's ancillary jurisdiction to enforce settlement agreement terminating litigation, the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement. (Appendix A at 25a.)

The Petitioners submit that Kokkonen allows the district court to enforce the "entire agreement," and Petitioners have sought to enforce terms which are "factually interdependent" with the terms of the Court's prior orders. To strip the district court of ancillary jurisdiction to enforce the Settlement Agreement while remanding the action back to the district court to enforce its orders will force the parties to litigate piecemeal facts which are closely intertwined. This is plainly unfair and a waste of judicial time, efforts and expense.

A. History Prior to the District Court Action

The facts of the case originated in 1970. Robert T. Mock ("Mock"), an employee of Appalachian Oil Corporation ("AOC"), claimed to be one of its shareholders. Although AOC and its owners contested this and even though he never proved that he was a shareholder, Mock and/or his family initiated several "shareholder derivative" claims on behalf of AOC against AOC's owners in the state courts of

Kentucky. The Respondent and her parents have had the facts and claims of this controversy before some court in some form since at least 1983. The Respondent, Dottie Renee McAlpin ("McAlpin"), is Co- Administratrix of the Estate of her father, Robert T. Mock (the "Mock Estate") with her husband, Tim McAlpin. Separate actions were filed in 1983, 1986, 1988 and 1995 prior to the commencement of the action in federal district court in 1997. All lawsuits claiming Robert Mock's shareholder status failed to survive motions to dismiss.

B. The District Court Action

In February, 1997, represented by the law firm of Doug Brandon ("Brandon"), Brian Gilfedder ("Gilfedder") and Patrick Nash ("Nash"), McAlpin filed yet another suite, this time in the U.S. District Court. In this action, McAlpin alleged violations by AOC and its owners of various federal statutes, including the Racketeer Influenced and Corrupt Organizations ("RICO") Act. These allegations were based on factual claims dating in the early 1980s and before.

Upon filing the federal complaint, Respondent and the Mock Estate simultaneously filed an *ex parte* motion for a temporary restraining order and sought the *ex parte* appointment of a receiver for AOC "to oversee the day to day operations of AOC and to insure that no documents or records are destroyed, altered, or concealed, or corporate assets dissipated." The district court granted this motion. Significantly, the McAlpins and the Mock Estate withheld from the court the slightest suggestion of the age of the claims or that these parties had already been in litigation in state court for over thirteen years and that state court litigation was pending at the time of the filing of the federal complaint and the *ex parte* motion and that the statute of limitations had run

on her claims. The District Judge was misled into issuing an *ex parte* temporary restraining order and appointing an individual named Morris Gahafer ("Gahafer") to act as receiver over AOC.

Gahafer was actually a witness for hire[1] and Gahafer's appointment was sought for the purpose of having him gather information on behalf of McAlpin and to make the "receivership" a forum for him to obtain documents outside the normal discovery process, and to provide conclusory testimony supporting McAlpin's position rather than marshaling the assets and managing the business of AOC as a receiver would ordinarily do.[2] Finally, McAlpin and

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[1] Mr. Gahafer's resume describes him as a "forensic accountant" and details his testimonial adventures.

[2] The McAlpins and the Mock Estate now freely admit this but blame it all on their former lawyers, Brandon, Gilfedder and Nash. As recognized by the Sixth Circuit Court of Appeals:

> As evidenced by the statements in her brief, McAlpin was well aware that Brandon's "litigation strategy" contemplated the "appointment of a receiver to take over the assets, records and operations of AOC" and to "uncover more recent actionable offenses with the limitations period." In short, McAlpin was well aware that, despite her statements to the district court that a receiver should be appointed simply to prevent AOC from destroying evidence or mismanaging assets, the Estate planned to use the receiver to seize and search AOC's records in an attempt to uncover evidence of actionable offences that were not barred by RICO's four-year statute of limitations. (Appendix A at 5a.)

Gahafer led the court to believe that McAlpin had obtained or would obtain a bond in the amount of $500,000.00 to secure AOC against any damage it might suffer if the temporary restraining order were issued in error. However, the only bond obtained in connection in that case was a receiver's bond that would indemnify the AOC should Gahafer fail to properly account for or disperse funds that came into his possession. Gahafer was appointed for the preservation of assets, or so the court intended when they ordered him to "see that the lawful day-to-day operations of Appalachian Oil Corporation are carried out without disruption." (Appendix B, Temporary Restraining Order, at 37a.)

In order to maximize the McAlpins' return from Gahafer's appointment, on February 21, 1997 Gahafer appeared without warning at the offices of AOC for the purpose of seizing every record he could find and doing so in a fashion that made him appear to be a law enforcement official moving in on criminals rather than a court-appointed receiver operating under an appointment in a civil matter.

Gahafer arrived at the offices of AOC unannounced and in the company of two armed federal marshals and three "assistants." The marshals entered the premises ahead of Gahafer and flashed their badges and identification. Gahafer then entered and identified himself not as a receiver but as a "forensic accountant." (Appendix M, Affidavit of Phil Scharr, at 83a - 85a.)

When Gahafer, his assistants, and the federal marshals arrived, AOC's owners were attending a funeral. Mr. Phil Scharr, an employee, identified himself as being "in charge" and requested that he be allowed to contact Mr. Jerry Garland, who had assumed primary responsibility for the day-to-day operations of AOC following the death of Mr. Vance

Mills on April 23, 1995. Mr. Scharr also requested that the receiver and his party wait "an hour or so" until the funeral was over. In response to that request, one of the federal marshals advised Mr. Scharr that they had some "fancy jewelry" for him "in their back pocket," that Mr. Scharr would either cooperate or that they would "take him to London" and that if anyone at the premises failed to cooperate, they would be "an accessory." [3] Although the federal marshals were only to "serve" the order, they remained with Mr. Gahafer throughout the performance of his seizure.

With respect to the three "business related" assistants, at least one of them was armed with a concealed firearm[4] and

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[3] The eloquent description of this event which was provided by Gahafer's attorney: "The marshal did remind them that he had authority to handcuff if they did not cooperate with this Court's Order, ..." (Appendix J, District Court Hearing Transcript, 3/17/97, at 74a). Nowhere is it written that the marshals had any authority to do anything other than serve the TRO. To maximize his recovery, Gahafer wanted AOC and its owners to believe that they were being treated by the district court as though they were criminals. This is confirmed by the fact that Gahafer had the marshals threaten to arrest and handcuff anyone for disobedience of a civil order and threaten to charge anyone as an "accessory" for failure to allow Gahafer to carry out the TRO as only Gahafer interpreted its terms.

[4] According to counsel for the receiver, the concealed firearm "was not used for the purpose of obtaining the records, but apparently it was made known for some reason to [AOC's employees] who were there." (Appendix J at 73a.) One can only imagine why a concealed firearm would have been "made known" to the employees of AOC during the raid.

another was carrying a large knife.[5] Both the gun and knife were shown to AOC's employees. Without identifying themselves, these individuals went about their business in the fashion of law enforcement officials. Under these conditions, Gahafer's "business related consultants" went through the offices of AOC without regard to questions concerning the scope of their duties, searched the desks and file drawers of its employees and took ancient records from an office next door.[6] (Appendix J, District Court Hearing Transcript, 3/17/97, at 71a - 75a.) Gahafer and his helpers made off with a van loaded with fifty-two (52) boxes of the Appellee's records. Gahafer even took AOC's litigation files containing thirteen years worth of confidential attorney-client communications.

In the conduct of all this activity, Gahafer was an officer of the Court by virtue of his appointment to serve as a "receiver" in this action. At the hearing on March 4, 1997 and as anticipated by AOC and its owners, the court appointed receiver produced a document which he had created and labeled "First Interim Receivership Report." That document was obviously the result of Gahafer's "witch hunt" and constituted a thinly-veiled effort to create a treatise in support of litigation, all of which would inure to the benefit of McAlpin and the Mock Estate in their continuing efforts to harass AOC and its owners through further litigation. The "analysis" and supporting documentation in the First Interim

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[5] Gahafer, through his attorney, Greg Parsons, admitted that he "just briefly saw the knife." (Appendix J at 73a - 74a.)

[6] Mr. Parsons provided the district court with his opinion that he was "sure that the defendants were surprised and upset by this." (Appendix J at 74a - 75a.)

Receivership Report included 162 pages. The report was also an obvious effort to catalogue and bundle a large number of documents dating from the 1960's.

Having been made aware of the aforesaid deceptions perpetrated by the McAlpins and the Mock Estate and upon being told of Gahafer's "raid," the district court, by order dated March 5, 1997, ordered McAlpin to post an injunction bond in the amount of $500,000.00 and declared that if "the plaintiff fails to post the bond as required by this paragraph, the Temporary Restraining Order issued by this Court on February 19, 1997 shall be dissolved." (Appendix C, District Court Order of 3/5/97, at 41a.) At McAlpin's request, to facilitate her efforts to procure the bond, the court ordered the receiver to surrender a copy of the financial statements of AOC to McAlpin and the Mock Estate so they could advise prospective sureties of the potential value of their inchoate claims of stock ownership. Even with this assistance, McAlpin failed to obtain a bond. When no bond was posted, the court dissolved the TRO and assessed the costs of the receivership against the Mock Estate and McAlpin.

The Mock Family had repeatedly filed lawsuits against AOC and its owners notwithstanding the failure of one law firm after another to prove either (i) that Robert Mock ever owned any stock in AOC or (ii) that AOC had engaged in any conflict of interest transactions. Because Petitioners recognized that the McAlpins would greedily digest the fruits of the receiver's labor, AOC and its owners moved on two occasions for orders requiring its documents be returned. The court granted AOC's oral motion and ordered that the records and any copies thereof be returned.

> On oral motion of the defendants, the receiver shall return all documents taken from the

> defendant's premises forthwith. The receiver shall not copy or disclose any portion thereof to anyone and if copies were made they are to be returned to Mr. Greg Partsons [sic], who in turn will return them to the defendants. (Appendix K, Civil Minutes of 3/6/97, 78a.)

The court's written order from the March 6, 1997 hearing failed to incorporate the court's express oral ruling. (Appendix D, District Court Order of 3/10/97, at 43a - 46a.) Accordingly, a motion to alter or amend was filed requesting that the court provide for the return of all the records Gahafer had obtained, including any copies, and this motion was granted by order dated July 18, 1997, wherein the court stated:

> [T]he Order shall be **AMENDED** to reflect that the Receiver shall return all documents taken from the defendant's premises, that the Receiver shall not disclose any document or portion thereof to anyone, and that any copies made shall also be returned to the defendants. (Appendix E, District Court Order of 7/18/97, at 50a.)

Still trying to make use of the fruits of Gahafer's raid on AOC as an illicit means of discovery, McAlpin's counsel noticed Gahafer's deposition and served him with a subpoena duces tecum on May 30, 1997. That triggered a motion for protective order which was granted. (Appendix E at 51a.) By this time, even the court's receiver, Gahafer, was put out with the McAlpins and the Mock Estate because they had not paid his fee as the court had previously ordered. (Appendix E at 50a.) On July 31, 1997, Gahafer filed a motion to hold McAlpin in contempt and to enter judgement for specific acts

pursuant to FRCP 70. Among other things, Gahafer asked the court to assign to him any right, title or interest of the Mock Estate in AOC. AOC opposed that motion on the grounds that the Mock Estate and McAlpin had no stock. McAlpin also opposed the Motion. On September 2, 1997, the district court entered a memorandum opinion and order dismissing the federal RICO claims as barred by the statute of limitations. (Appendix F, Memorandum, Opinion, and Order of 9/2/97, at 52a - 61a.) Thus, the district court became the fourth court to dismiss the claims of the Mock Estate and McAlpin. However, the court also scheduled a further hearing for Friday, September 5, 1997 with respect to Gahafer's motions.

Although the court had dismissed McAlpin's claims, AOC undertook to resolve this matter once and for all and to buy full and final peace with the Mock Family. At the hearing concerning the payment of the receiver's fees, and at Tim McAlpin's request, Mr. Jerry Garland, President of AOC, met privately with Tim McAlpin to negotiate a settlement. Throughout their meeting, Mr. McAlpin repeatedly told Mr. Garland that Mr. McAlpin needed to settle the case so "he could take [Mrs. McAlpin] to the Bahamas." The district court also took an interest in the settlement and, at one point, even expressed an opinion as to the sufficiency of an offer made by AOC.[7]

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[7] The district court, during the course of a Settlement Conference expressed the opinion that $75,000.00 was "probably not a bad offer" whereas the McAlpins' demand of $170,000.00 was "far too much of a demand." Notwithstanding that the district court felt that $75,000.00 was "not a bad offer," AOC and its owners agreed to pay $95,000.00 but only because they believed such payment would finally end the constant litigation over the

Mr. Garland and Tim McAlpin finally did reach a settlement and in open court, with Tim McAlpin present, the settlement was announced. The court's receiver, by and through counsel, also participated in these settlement negotiations because the receiver could only be paid from the funds paid to the McAlpins by AOC. AOC's counsel advised the court that a settlement agreement had been circulated with

> a number of provisions that all of the litigation will be settled in whatever forums and that all documents will be returned to us upon which that litigation, future litigation might be based. In other words, for the amount we're paying we want to be assured that our disputes are forever resolved with the plaintiff, and that it is a comprehensive document.

McAlpin's counsel, with both of the McAlpins present, confirmed that such terms were agreeable. The McAlpins and the Mock Estate agreed to settle in exchange for payment of $95,000.00 from AOC. In exchange for this payment, the McAlpins and the Mock Estate agreed as follows:

> Gahafer and the Plaintiffs warrant and represent to the Defendants that they have returned any and all documents, including copies thereof, which were obtained as the result of the performance of Gahafer's duties as receiver. Simultaneously with the execution of this Agreement Gahafer and the Plaintiffs have executed an Agreed Order providing that any and all copies of the Receiver's First

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ancient facts of this case. (Appendix J at 71a - 75a.)

> Interim Report will be delivered to the Defendants by Gahafer and/or his attorneys. The Plaintiffs agree to return to the Defendants any and all documents which they have concerning AOC and/or its operations . . . .
>
> The Plaintiffs and Gahafer agree that from and after the date of this Agreement, they and anyone claiming through them will forever refrain from making any claim or demand or filing any claim in any form or before any court or administrative agency that i) Robert Mock or anyone claiming through him is or was a shareholder of AOC; ii) that any of the Defendants has committed any of the acts described in any of the litigation described in the preambles to this Agreement; or iii) that any of the Plaintiffs have any claims against the Defendants. (Appendix A at 12a.)

Approximately one year after settling this claim with Petitioners, the McAlpins then filed a lawsuit alleging legal malpractice in the Kentucky state court against the attorneys who had represented them in the district court action, namely, Brandon, Gilfedder and Nash. Thereafter, it came to the attention of AOC that the McAlpins and the Mock Estate had in their possession many of the documents which were taken or generated by the receiver (including the First Interim Receivership Report) and which were supposed to have been returned to AOC by the district court's orders and the specific terms of the Settlement Agreement signed by the McAlpins and Gahafer. The Mock Estate and the McAlpins claimed that Robert Mock had been a shareholder of AOC in their malpractice complaint against Brandon and the other attorneys (the "Malpractice Complaint"). By these actions, the

McAlpins were in violation of the district court's orders and in breach of certain terms of the Settlement Agreement.

Upon motion by the Petitioners herein, the district court held Respondent in contempt and directed compliance with the earlier orders and the terms of the Settlement Agreement. The district court also awarded AOC and its owners their costs and attorney's fees incurred in enforcing the settlement. (Appendix H, District Court Order of 1/14/99, at 66a - 68a.)

C. The Appeal to the Sixth Circuit Court of Appeals

Respondent appealed the district court's orders re-opening the case and holding her in contempt for failure to comply with its prior orders and enforcing the terms of the Settlement Agreement to the Sixth Circuit Court of Appeals. Respondent argued that the district court's order dismissing the action as settled left the district court without jurisdiction to hold her in contempt as the earlier orders of the district court commanding return of AOC's documents did not specifically refer to the Respondent.

Petitioners argued that the district court retained jurisdiction by virtue of (a) the authority to enforce its orders; (b) the court's inclusion of settlement terms in its prior orders and the order of dismissal; (c) the court's power to control its receiver and the property over which the court, through its receiver, had taken control and to mitigate harms which were caused by abuses of the court's own process; and (d) the court's authority to restrain state court proceedings to effectuate the district court's new orders under the Anti-Injunction Act, 28 U.S.C. § 2283. In its order dated October 3, 2000, the court of appeals reversed and remanded, stating that:

> [b]ecause this court has joined other circuits in strictly applying *Kokkonen's* relatively narrow interpretation of the district court's ancillary jurisdiction to enforce settlement agreements terminating litigation, the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement. (Appendix A at 25a.)

Thus, the Sixth Circuit appears to require that before any settlement agreement can be enforced, the district court must have jurisdiction over the "entire" agreement by complete incorporation. Nowhere did Kokkonen impose such a requirement. The Sixth Circuit also appears to eliminate the notion that district courts should analyze the specific provisions of settlement agreements to determine if factual interdependence exists between the provisions of Court's orders and the Settlement Agreement to determine whether ancillary jurisdiction exists. Nowhere did Kokkonen suggest that the doctrine of ancillary jurisdiction should be so narrowly applied.

In deference to the district court to state whether the prior orders included McAlpin, the Sixth Circuit stated that "the district court may on remand uphold the portions of the orders directing McAlpin to return confidential documents to the [Petitioners] if the court determines that its 1997 rulings directing [the receiver] to return all documents seized during his receivership also bound McAlpin, either directly or because she was complicit in the retention of the documents at issue." (Appendix A at 29a.) In fact, on remand in an order dated December 1, 2000, the district court did command McAlpin to "turn over all documents and copies of

documents seized during Gahafer's receivership to the [Petitioners] **IMMEDIATELY**." (Emphasis in original.) (Appendix I, District Court Order of 12/1/00, 69a - 70a.) Thus, the district court clarified both its intent to have all the documents seized in Gahafer's raid on AOC returned and its intent to include McAlpin in the several 1997 orders.

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

The "strict interpretation" of Kokkonen applied by the Sixth and other Circuits is inconsistent with the ruling of this Court.

In its opinion below, the Sixth Circuit Court of Appeals advised that it had "joined with other circuits" in strictly interpreting Kokkonen v. Guardian Life Insurance Company of America, 114 S. Ct. 1673, 511 U.S. 375, (1994) and thereby stripping the district court of its ancillary jurisdiction. The Sixth Circuit apparently interprets the many cases which are factually similar to Kokkonen as support for the proposition that Kokkonen should be strictly applied. This strict application of Kokkonen will force parties to actions dismissed from district court to litigate piecemeal the claims which are factually interdependent with the orders of the district court. In this case, the Sixth Circuit's analysis allows the district court to enforce its orders with regard to the return of documents obtained by the Respondent's abuse of the district court's power but, relegates the Petitioners to state courts to enforce the terms of the Settlement Agreement to force the return of the same documents under the Settlement Agreement and to eliminate the factual claims which depend upon those documents and collect attorneys fees. It makes no sense that the district court, on remand,

may exercise jurisdiction to vindicate its authority by enforcing its earlier orders which center on the return of AOC's documents as does the Settlement Agreement, but that the district court may not, in that exercise of jurisdiction, go on to enforce the remaining terms of the Settlement Agreement. Such application of Kokkonen is completely inconsistent with this Court's lesson on ancillary jurisdiction. Thus, it is imperative that this Court revisit the Sixth Circuit's strict interpretation of this precedent-setting case. That interpretation essentially eliminates ancillary jurisdiction in the district courts even though Kokkonen would have allowed ancillary jurisdiction.

The matters at issue herein touch the very heart of ancillary jurisdiction. As stated by this Court ancillary jurisdiction exists: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Kokkonen v. Guardian Life Insurance Company of America, 114 S. Ct. 1673, 511 U.S. 375 at 380 (1994) (citations omitted). Kokkonen fully supports the jurisdiction of the district court to enter post-dismissal orders based on settlement agreements as the district court did in this case. Yet the court of appeals appears to now require the district court to adopt a settlement agreement in its entirety in order have the jurisdiction to enforce its terms, even where some of the settlement terms require the same duties of Respondent as do the orders which the district court is permitted on remand to enforce. This is contrary to the

application of ancillary jurisdiction as explained by this Court in Kokkonen.[8]

In analyzing Kokkonen, it is important to see the case for what it is not. Clearly, Kokkonen is not an abandonment of doctrine of ancillary jurisdiction. To the contrary, Kokkonen is an analysis rather than a rejection of ancillary jurisdiction. Kokkonen examines the very narrow question of whether ancillary jurisdiction justifies a district court's assertion of jurisdiction over the terms of a settlement agreement where (i) the order of dismissal makes no mention of the parties' Settlement Agreement; (ii) the order of dismissal makes no mention of the disposition of property in the hands of a court-appointed receiver; (iii) no orders of the court were violated by the parties' post-dismissal activities; (iv) none of the parties is a court-appointed receiver; (v) the documents which were the subject of the parties' disagreement

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[8] This "strict application" is also inconsistent with the notion that ancillary jurisdiction is a concept which cannot be reduced to simple rubrics. According to the Sixth Circuit, "*Kokkonen* precludes the district court from enforcing any provisions of the Settlement Agreement that were not expressly incorporated into an order entered while the case was still pending on the court's docket." (Appendix A at 21a.) Thus, the Sixth Circuit has reduced the existence or non-existence of ancillary jurisdiction to a simple rubric. This is completely contrary to Justice Scalia's description of the doctrine as one which "can hardly be criticized for being overly rigid or precise." Kokkonen at 379. The Sixth Circuit's interpretation also leaves no opportunity for district courts to apply the doctrine of ancillary jurisdiction so as to allow federal courts to exercise "jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." Kokkonen expressly described the concept in those terms. Kokkonen at 378.

were never under the express control of the court; and (vi) the court did not have an interest in returning the parties to their pre-TRO/receivership position. Kokkonen is actually very narrow.

ARGUMENT 2

Kokkonen provides support for the District Court's exercise of jurisdiction in this case.

Contrary to the "strict application" applied below, Kokkonen supports the district court's jurisdiction over the terms of settlement agreements affecting the same property as was affected by the district court's prior orders. Kokkonen analyzes ancillary jurisdiction in terms of two extremes. The most expansive definition, according to Justice Scalia, is found in a case styled Julian v. Central Trust Co., 193 U.S. 93, 24 S.Ct. 399, 48 L.Ed. 629 (1904). The most restrictive description, in fact one which Justice Scalia labels as "an excessively limited description," is as follows: "[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." Kokkonen, at 379 (quoting Fulton Nat. Bank of Atlanta v. Hozier, 267 U.S. 776, 280, 45 S.Ct. 261, 262, 69 L.Ed. 609 (1925)). Kokkonen clearly states that "ancillary jurisdiction . . . recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." Kokkonen, 511 U.S. 375, 378.

In this case, the orders which were entered by the district court have a direct relationship to the property and assets actually, in fact, violently, drawn into the court's control, namely, AOC's corporate documents and the

receiver's report based upon those documents. Therefore, even by the most overly restrictive description of the scope of ancillary jurisdiction which Justice Scalia could find, this case fits well within the doctrine of ancillary jurisdiction.

The Kokkonen Court elucidated the power of the Court thus:

> [W]e have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) ***to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent***, see, e.g., Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469, n. 1, 94 S.Ct. 2504, 2506, n. 1, 41 L.Ed.2d 243 (1974); Moore v. New York Cotton Exchange, 270 U.S. 593, 610, 46 S.Ct. 367, 371, 70 L.Ed. 750 (1926); and ***(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees*** (Emphasis added).

Kokkonen v. Guardian Life Insurance Company of America, 114 S. Ct. 1673, 511 U.S. 375, 380 (1994) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (power to compel payment of opposing party's attorney's fees as sanction for misconduct); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) (contempt power to maintain order during proceedings), and 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3523 (1984); cf. § 28 U.S.C. 1367 (1988 ed., Supp. IV).

The Kokkonen Court, further acknowledging reasons for the assertion of ancillary jurisdiction, added that this Court had "recognized *inherent authority* to appoint counsel to *investigate and prosecute violation of a court's order.*" (Emphasis added) Kokkonen at 380, citing Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). Nowhere did the Kokkonen Court indicate that it was either eliminating the court's ability to manage its proceedings, vindicate its authority or effectuate its decrees. Furthermore, *a fortiori*, the power of a federal court to conduct proceedings necessary to effectuate and implement decrees lies within the blanket of ancillary jurisdiction. "That a *federal court* of equity *has jurisdiction* of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, *to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled.*" (Emphasis added citations omitted) Local Loan Co. v. Hunt, 292 U.S. 234, 239, 54 S.Ct. 695, 697, (1934).

Factually, this case is very different from Kokkonen. First, Kokkonen did not involve documents obtained through an abuse of the power conferred upon a receiver appointed by a United States District Court. In fact, it does not appear that Mr. Kokkonen obtained the documents and records which he possessed through the court process at all. Second, the Kokkonen Court did not assume control of the documents which were the subject of the parties' later dispute. Mr. Kokkonen did not dispatch a "receiver," two United States Marshals, and three armed thugs to seize over 20 years of business records from Guardian Life. Most importantly, Kokkonen did not involve multiple and specific orders of the district court directing the disposition of documents wrongfully taken from a defendant by an expert witness cloaked with the full authority of an officer of the Court.

"The only order [in Kokkonen] was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement." Kokkonen at 380. In fact, the dismissal order in Kokkonen "did not so much as refer to the settlement agreement." Id. at 377. In the instant action, McAlpin's breach of the Settlement Agreement clearly flouts and imperils the orders of the United States District Court.

Kokkonen stated that jurisdiction would be rightfully asserted "by incorporating the terms of the settlement agreement in the order." Kokkonen at 381. Such was the case now before this Court but the Sixth Circuit characterized the incorporation by stating that "only one small part of the settlement agreement was incorporated into the court's order dismissing the suit." (Appendix A at 2a.) Petitioners do not agree that this was "small." It was an important element of the settlement.

The Sixth Circuit referred to cases which stand for the proposition that merely mentioning, in a dismissal order, the fact that there has been a settlement is not sufficient to confer upon the court jurisdiction to enforce the settlement. See Scelsa v. City University of New York, 76 F.3d 37 (2nd Cir. 1996); In re Phar-Mor, Inc. Securities Litigation, 172 F.3d 270 (3rd Cir. 1999); and Meiner v. Missouri Depart. Of Mental Health, 62 F.3d 1126 (8th Cir. 1995). In this case, however, the dismissal order goes beyond merely mentioning the settlement, in that it contains terms of the Settlement Agreement which relate to the documents now wrongfully in the possession of McAlpin. Moreover, the dismissal order and at least two other orders of the district court are specific orders concerning the disposition of documents. These orders are not merely "threatened" or "imperiled" by the McAlpins' breach of the Settlement Agreement rather, these orders are

trampled, ignored and completely and totally disregarded by Respondent's breach.

Unlike Kokkonen, Petitioners herein sought enforcement of the district court's prior orders requiring the return of all documents, including copies *and* the provisions of the district court's order of dismissal which imposed the same requirement. These prior orders constitute separate bases for the assertion of jurisdiction, but even if the district court's prior orders did not exist, since the Agreed Order of Dismissal incorporates at least one term of the Settlement Agreement, the district court has ancillary jurisdiction to enforce the provisions of the Settlement Agreement which is closely related to the incorporated provision. In fact, the Sixth Circuit even noted that the district court's "directive to Gahafer incorporated his (and potentially McAlpin's) duties under the [Settlement] Agreement." (Appendix A at 14a.) On remand, the district court clarified its intent to include McAlpin. (Appendix I at 69a - 70a.)

Kokkonen made no suggestion that the effect of its holding was to strip a district court of the power to function successfully, manage its proceedings, vindicate its authority or effectuate its decrees by seeing to the complete return of documents taken by a "forensic accountant" brandishing federal marshals, guns, knives, handcuffs, the threat of immediate arrest, and an Order of the United States District Court, all of which was accomplished in the complete absence of a bond.[9]

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[9] Paragraph 3 of the district court's Agreed Order of Dismissal with Prejudice states as follows:

That the Court appointed Receiver, Morris

Under the clear language of Kokkonen, if the district court has jurisdiction to enforce its order then it has ancillary jurisdiction to enforce the related provisions of the parties' agreement. Kokkonen at 380. This is especially true where the subject of the orders and the subject of the agreement are one and the same and the orders have incorporated the "duties" of the Settlement Agreement. Kokkonen does not indicate that a court must incorporate all of the terms of the agreement in order to enforce the agreement in its entirety. Furthermore, Kokkonen does not state that the court must incorporate a particular provision of an agreement into an order as a condition of retaining authority to enforce that particular provision of the agreement. In fact, Kokkonen implies just the opposite. Acknowledging that courts possess

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> Gahafer, is hereby ordered to turn over to the Defendants, **any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents with he may have obtained or generated** as the result of the performance of his duties as Receiver herein. (Emphasis added) (Appendix G, District Court Agreed Order of 9/24/97, at 63a - 64a.)

It should be noted that this same language is in the court's prior order for the return of all documents to the Defendants. Further, this is the same language contained in a portion of Paragraph 9 of the Settlement Agreement which is herein quoted verbatim. In the court's civil minutes of March 6, 1997, the court ordered that "the receiver shall return all documents taken from defendants' premises forthwith. The receiver shall not disclose any document or portion thereof to anyone and if copies were made they are to be returned to . . . defendants." This was reiterated by the court in its July 18, 1997 order.

ancillary jurisdiction to enforce agreements, Kokkonen also states:

> The situation would be quite different [and jurisdiction would exist] if the parties' obligation to comply with the **terms of the settlement agreement** had been made part of the order of dismissal--either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) **or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist** [Emphasis added]. Kokkonen 511 114 S.Ct. 1673, 1677, 511 U.S. 375, 381

If the court's jurisdiction were limited only to those terms of a settlement agreement which were expressly incorporated into an order, then the Kokkonen Court would not have written the language quoted above. Instead, it would have held that courts retain jurisdiction only to enforce their orders and that no ancillary jurisdiction exists to enforce agreements not incorporated into orders. But Kokkonen indicates that once a court has one term incorporated into an order, the court has jurisdiction over the related provisions of the Settlement Agreement.[10] The district court incontrovertibly has jurisdiction to enforce its orders.

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[10] 28 U.S.C. § 1367.

CONCLUSION

The strict interpretation and application of Kokkonen by the court of appeals is inconsistent with this Court's explanation of ancillary jurisdiction as set forth in that case. In its interpretation of Kokkonen, the court of appeals has effected a new standard for the exercise of ancillary jurisdiction, specifically, that a district court must incorporate a settlement agreement in its entirety or the district court must by specific provision retain jurisdiction before it may exercise ancillary jurisdiction to enforce the terms thereof. This new standard is inconsistent with the plain language of Kokkonen. This is an important and often recurring issue before the district courts although the Sixth Circuit's opinion below is less than 90 days old, it has already been cited by another court.[11] Only the guidance and direction of the Supreme Court will alleviate such confusion with regard to the ancillary jurisdiction of the district court. Therefore, the Petition for Writ of Certiorari should be granted.

/s/_____
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[11] See York v. County of El Dorado, 119 F. Supp. 2d 1106 at 1108, (E.D. Cal. 2000).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed October 5, 2000]

No. 99-5281

DOTTIE RENEE MCALPIN,
Plaintiff-Appellant,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., a Kentucky corporation; MARIE MILLS, as Administratrix of the Estate of Vance Mills; BECKHAM GARLAND; APPALACHIAN OIL CORPORATION, a Kentucky corporation; G&M OIL COMPANY, INC., a Kentucky corporation; B&V REALTY CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at Pikeville
No. 97-00072 - Joseph M. Hood, District Judge

Argued: August 11, 2000

Decided and Filed: October 3, 2000

Before: KRUPANSKY, WELLFORD, and BOGGS, Circuit Judges.

OPINION

BOGGS, Circuit Judge. Plaintiff-Appellant Dottie Renee McAlpin challenges on jurisdictional grounds two district court orders holding her in contempt of the court's prior orders and of the settlement agreement that the parties executed in an effort to terminate the litigation underlying this appeal. Only one small part of the settlement agreement was incorporated into the court's order dismissing the suit. Thus, the court had no jurisdiction with regard to most of the order appealed from. We therefore reverse and remand for consideration of an order within the court's jurisdiction.

I

History of the Litigation

Plaintiff-Appellant Dottie Renee McAlpin brought the suit that gave rise to the settlement agreement at issue in this appeal in her capacity as administratrix of the estate of her late father, Robert T. Mock, and as an alleged shareholder of the primary defendant in this case, Appalachian Oil Company

(AOC).[1] In her suit before the district court, McAlpin alleged that AOC, in a series of illegal transactions, defrauded Mock, and thereby his estate, of the value of the stock he allegedly held in the company. In her complaint, McAlpin asserted that the district court had federal question jurisdiction over her suit because AOC's unlawful actions constituted a pattern of racketeering under the civil RICO statute, 18 U.S.C. §§ 1961-1968. The state law claims over which McAlpin claimed the district court had supplemental jurisdiction were previously pled in 1983 and 1986 by McAlpin's predecessors-in-interest, Robert Mock and his wife, Dottie T. Mock, and were also pled by McAlpin herself in a state court action in 1988. The claims raised in the state court proceedings were not adjudicated on the merits, however, so McAlpin was not barred from re-pleading them ancillary to her federal RICO claim.[2]

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[1] Although AOC was administratively dissolved on November 7, 1996, for failing to file an annual report, it remains a party to this litigation and is referred to as the principal or primary defendant because it is the corporation in which Robert T. Mock, McAlpin's predecessor in interest, allegedly owned stock.

[2] The 1983 action filed was dismissed by the Pulaski Circuit Court for improper venue. The 1986 action was dismissed by the Knox Circuit Court for lack of prosecution, and the Kentucky Court of Appeals found that dismissal to be without prejudice. McAlpin brought the 1988 suit in Pulaski Circuit Court, but voluntarily dismissed the case upon learning that her father's 1983 suit in that court was dismissed for improper venue.

McAlpin's father, Robert Mock, was an AOC employee who was discharged by the company in the early 1980's. According to McAlpin, Mock owned 25% of AOC's stock when he was discharged, and had an option to acquire an additional 24% of the company's outstanding shares, which option he allegedly attempted to exercise after he left the corporation. When Mock's efforts to exercise the option were rejected by the company on May 28, 1983, Mock filed suit in the Pulaski Circuit Court to enforce his rights against AOC and its directors. Although Mock prevailed on his claims for past wages, his breach of contract and other claims were dismissed without prejudice for lack of venue. Mock died in March 1986, and Dottie Mock, his widow and the administratrix of his estate, refiled his breach of contract claims against AOC in Knox County Circuit Court, but the case was dismissed in April 1995 for lack of prosecution. When Dottie Mock died on September 6, 1994, McAlpin was appointed administratrix of her father's estate, and her husband Tim McAlpin was later appointed co-administrator. With Tim's assistance, McAlpin retained Douglas C. Brandon, one of the defendants in McAlpin's current legal malpractice suit in Fayette County, to represent the Mock Estate in its civil RICO suit against AOC in the district court. The Mock Estate was, and remains, insolvent. As McAlpin notes in her brief before this court, the Estate's only asset is Robert Mock's alleged 25% stock ownership in AOC and his alleged option to acquire an additional 24% of the company's outstanding shares.

Procedural History in the District Court

McAlpin filed suit against AOC in the district court on February 19, 1997. According to McAlpin, Brandon, who

offered to take the case on a contingency basis and to advance the Estate's litigation costs, advised her: (1) that the Estate had the best chance of recovering against AOC in a shareholder derivative suit on behalf of, and for the benefit of, AOC; (2) that he would ask for a temporary restraining order and for the appointment of a receiver upon the filing of the federal court complaint; and (3) that AOC would ultimately be responsible for the payment of all fees, costs and expenses. As evidenced by the statements in her brief, McAlpin was well aware that Brandon's "litigation strategy" contemplated the "appointment of a receiver to take over the assets, records and operations of AOC" and to "uncover more recent actionable offenses with the limitations period." Appellant's Br. at 10. In short, McAlpin was well aware that, despite her statements to the district court that a receiver should be appointed simply to prevent AOC from destroying evidence or mismanaging assets,[3] the Estate planned to use the receiver to seize and search AOC's records in an attempt to uncover evidence of actionable offenses that were not barred by RICO's four-year statute of limitations. To this end, Brandon filed an ex parte motion asking the district court to issue a temporary restraining order and to appoint Morris Gahafer, a forensic accountant, as AOC's receiver. The motion was supported by affidavits from McAlpin and from Gahafer, whom Brandon had solicited as a potential receiver prior to filing McAlpin's complaint.

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[3] In her affidavit in support of her motion for receivership, McAlpin requested that the court "appoint a receiver to oversee the day to day operations of AOC and insure that no documents or records are destroyed, altered, or concealed, or corporate assets dissipated."

Based on the supporting affidavits, the district court issued a temporary restraining order on February 19, 1997, enjoining AOC from destroying, altering and/or concealing documents and from disposing of corporate assets. The court also granted McAlpin's request to appoint Gahafer as receiver. At the time it issued the order appointing Gahafer, the district court believed, based on McAlpin's representations, that Gahafer's receiver's bond (secured by Ohio Casualty in the amount of $500,000) would serve as security pursuant to Federal Rule of Civil Procedure 65(c) for any costs or damages incurred by AOC were it subsequently determined that the company had been wrongfully enjoined or placed in receivership.[4] In its order, the district court directed United States Marshals to accompany Gahafer to AOC's headquarters to serve the TRO, which was to remain in effect pending an injunction hearing on March 4, 1997. On February 21, 1997, Gahafer, accompanied by federal marshals and armed private security guards, served the court's restraining order on AOC, searched the offices of AOC and its co-defendant G&M, and seized records from both companies' offices. According to AOC, after threatening AOC employees when the employees objected to the unannounced search, Gahafer and the marshals left AOC's premises in a van containing some 52 boxes of confidential corporate documents. At the injunction hearing on March 4, 1997, AOC objected to the adequacy of Gahafer's bond and to Gahafer's role in the litigation, expressing significant

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[4] The court subsequently discovered that Gahafer's bond was posted only as security for any damages that AOC might sustain as a result of Gahafer's failure properly to account for funds that came into his possession as the company's receiver.

concerns regarding McAlpin's failure to post an injunction bond, the scope of Gahafer's power as receiver, and the manner in which Gahafer and the Marshals served the TRO and seized AOC's and G&M's corporate records. Gahafer responded to AOC's objections by submitting to the court his "First Interim Receivership Report"[5] and by requesting an order approving his fees and expenses.

Upon realizing that, despite McAlpin's representations, Gahafer's bond was not a true injunction bond but served only to indemnify AOC for damages resulting from Gahafer's failure properly to account for funds that came into his possession as AOC's receiver, the district court on March 5, 1997, issued an order directing McAlpin to post a surety bond in the amount of $ 500,000 no later than 4.00 p.m. that day. The court also directed Gahafer to submit a proposed order clarifying his duties in the litigation. The district court extended the TRO until March 6, 1997, and ordered Gahafer to submit a balance sheet detailing AOC's assets and liabilities. At a hearing on March 6, 1997, the district court was informed that McAlpin had not posted the required surety bond as directed by the court's March 5

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[5] The report stated, among other things, that AOC's records evidenced Robert Mock's ownership of 13 shares of AOC stock and that AOC appeared to have engaged in some interested transactions, but that Gahafer needed to review additional witnesses and interview certain AOC management employees to determine the extent of any wrongdoing.

order,[6] and that Gahafer had not prepared a balance sheet. In response to McAlpin's failure to post bond and to questions concerning Gahafer's duties and qualifications as receiver, Judge Hood issued an order dated March 10, 1997, in which he: (1) dissolved the Temporary Restraining Order; (2) denied McAlpin's motion for a preliminary injunction; (3) granted Gahafer's motion for approval and payment of costs; (4) directed McAlpin to pay Gahafer's fees and costs totaling $28,640.92 as of March 5, 1997, along with any additional fees or charges thereafter incurred; (5) dissolved the receivership and relieved Gahafer of any further responsibilities as receiver; (6) directed Gahafer's counsel to retain all copies of Gahafer's First Interim Report, and (7) ordered Gahafer not to disclose to anyone other than his attorney any information he obtained in his capacity as AOC's receiver.

On May 1, 1997, Gahafer moved the district court to alter or amend the March 10 order to provide that McAlpin

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[6] McAlpin explains in her brief on appeal that she was unable to obtain the bond because the Mock Estate's only asset – its alleged stock ownership in AOC – was at the most worth $457,757.51, an amount insufficient to cover the obligation on a $500,000 bond. McAlpin blames her attorney for her failure to obtain the bond, alleging that, had "Brandon not chosen to rely on the questionable AOC financial statements and . . . instead undertaken any due diligence to investigate and/or obtain any independent valuations of just the real estate owned by AOC," a bond would have been issued because the insurers McAlpin contacted refused to issue a bond based on the alleged value of the Mock Estate's stock in AOC as reflected in AOC's March 1997 financial statement.

would be held in contempt if she continued to withhold payment of his fees. McAlpin filed a response stating that the Estate was insolvent and that Gahafer's fees should be taxed against AOC and its co-defendants. McAlpin thereafter sought, in spite of the district court's March 10 order, to obtain Gahafer's First Interim Report and to obtain documents that Gahafer seized during his receivership by filing a Notice of Deposition and Subpoena Duces Tecum compelling Gahafer to testify at a deposition on June 16, 1997. On June 4, 1997, Gahafer sought a protective order against McAlpin's subpoena, and on July 18, 1997, the district court entered a comprehensive ruling disposing of the parties' various motions and clarifying its March 10 order dissolving both Gahafer's receivership and the temporary restraining order against AOC.

In its July 18 order, the district court also declined to tax Gahafer's fees against AOC, noting that it had made it "very clear" in its March 10 order that McAlpin was responsible for paying Gahafer's fees. The district court denied Gahafer's motion for a show cause order on the basis that it would be unfair to punish McAlpin for failing to pay Gahafer before the court ruled on her motion to amend its March 10 order. However, having denied McAlpin's motion to amend, Judge Hood on July 18 directed her not to delay any further and to pay Gahafer's fees within ten days. The court then sustained Gahafer's motion for a protective order, quashed McAlpin's subpoena, held that McAlpin could not depose Gahafer, and held that Gahafer would not be required to produce any document or to respond to any discovery in connection with McAlpin's suit against AOC. In addition to granting Gahafer's motion for a protective order, the court granted AOC's motion to amend the court's March 10 order

dissolving the receivership to reflect the court's March 6 ruling that:

> The Receiver shall return all documents taken from the defendants' premises, . . . the Receiver shall not disclose any document or portion thereof to anyone, and . . . any copies made shall also be returned to the defendants.

McAlpin failed to pay Gahafer's fees within 10 days of the district court's July 18 order and, on July 31, 1997, Gahafer moved to hold McAlpin in contempt. Gahafer also requested that the court divest the Mock Estate of any interest in, or claim of ownership to, the corporate stock of AOC and vest such right, title, interest or claim in him. In the alternative, Gahafer moved the district court to issue a writ of attachment or sequestration against the Mock Estate's only asset - its alleged ownership interest in AOC - in order to effect compliance with the court's July 18 order. McAlpin filed a response on August 15, 1997, stating that the Mock Estate was insolvent and that it would be inappropriate for the court to hold it in contempt. McAlpin's counsel then proposed that the court require AOC to reissue 1.61 of the 13 shares of AOC stock allegedly owned by the Mock Estate to Gahafer to secure his fees, and that AOC remit the remaining 11.39 shares to the Estate.[7]

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[7] Gahafer's First Interim Report refers to corporate documents evidencing Robert Mock's ownership of 13 shares of AOC stock.

On September 2, 1997, the district court filed an extensive order dismissing McAlpin's suit on the merits and disposing of the parties' pending motions. In the September 2 order, the district court: (1) dismissed with prejudice as time-barred McAlpin's civil RICO claims; (2) declined to exercise supplemental jurisdiction over McAlpin's remaining state law claims; (3) denied as moot AOC's motion to transfer venue and McAlpin's motion for leave to file her response out of time; and (4) scheduled a hearing for September 5, 1997, to consider Gahafer's motion to hold McAlpin in contempt of the court's order directing her to pay Gahafer's fees. The district court never ruled on Gahafer's contempt motion, however, because the parties, who had been engaged in settlement negotiations since May 23, 1997, executed a final settlement agreement disposing of the litigation on September 22, 1997. McAlpin began the negotiations by demanding $1,000,000 in exchange for the release of all her claims against AOC. As McAlpin explains in her brief however, "following the entry of the September 2, 1997, Order, Brandon convinced [her and her husband] that they had no alternative but to settle their claims for essentially whatever amount the Defendants were willing to pay" because if they did not settle, Gahafer would proceed with his motion for contempt and the estate would lose all of its stock in AOC.

Pursuant to the Settlement Agreement, Mutual Release and Covenant Not to Sue executed on September 22, 1997, AOC paid McAlpin a total of $95,000, $36,000 of which went to Gahafer, $13,000 of which went to Brandon for fees, and $59,000 of which went to the Mock Estate. Both McAlpin and her husband personally initialed each page of the Settlement Agreement, which provided in pertinent part that:

> Gahafer and the Plaintiffs warrant and represent to the Defendants that they have returned any and all documents, including copies thereof, which were obtained as the result of the performance of Gahafer's duties as receiver . . . . Simultaneously with the execution of this Agreement Gahafer and the Plaintiffs have executed an Agreed Order providing that any and all copies of the Receiver's First Interim Report will be delivered to the Defendants by Gahafer and/or his attorneys. The Plaintiffs agree to return to the Defendants any and all documents which they have concerning AOC and/or its operations . . . .
>
> The Plaintiffs and Gahafer agree that from and after the date of this Agreement, they and anyone claiming through them will forever refrain from making any claim or demand or filing any claim in any form or before any court or administrative agency that i) Robert Mock or anyone claiming through him is or was a shareholder of AOC, ii) that any of the Defendants has committed any of the acts described in any of the litigation described in the preambles to this Agreement, or iii) that any of the Plaintiffs have any claims against any of the Defendants.

In addition to providing for the release of McAlpin's claims against the Defendants, the Settlement Agreement provided for the release of all claims that McAlpin might assert against

her attorneys, Messrs. Brandon, Gilfedder, and Nash. Although McAlpin alleges in her brief on appeal that she was "not informed" that the Settlement Agreement "contained a release of [claims against her] counsel," Appellant's Br. at 28, both McAlpin and her husband personally initialed each page of the Agreement. The Agreement did not provide for the district court to retain jurisdiction over its terms or enforcement.

On September 24, 1997, the district court entered an Agreed Order of Dismissal With Prejudice, which provided in pertinent part:

> The parties being in agreement and the Court being otherwise sufficiently advised that the parties hereto have settled their disputes,. . . . the Court hereby orders:
>
> 1. That the Complaint filed herein is DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS asserted therein and this action is Ordered stricken from the docket of this Court in its entirety.
>
> 2. That this Court's Order of August 29, 1997, is hereby amended to provide that Count II of the Complaint is Dismissed with Prejudice.
>
> 3. That the Court appointed Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents which

> he may have obtained or generated as a result of the performance of his duties as Receiver herein.

As is apparent from the language of the order, the district court did not expressly retain jurisdiction over the Settlement Agreement nor order McAlpin herself to take any action, although the court's directive to Gahafer incorporated his (and potentially McAlpin's) duties under the Agreement.

In June 1998, McAlpin and her husband retained new counsel (Rambicure, Miller & Kuebler, hereinafter referred to as "RMK") to pursue a legal malpractice suit against the attorneys who represented the Mock Estate in the district court action before Judge Hood.[8] Before filing McAlpin's malpractice claim in the Fayette Circuit Court on September 18, 1998, RMK, which took the case on a contingency basis, obtained from Tim McAlpin an appraisal of AOC's real estate holdings in Florida. The appraisal suggested that AOC was worth more than the amount indicated in its 1997 financial statement, upon which McAlpin allegedly relied in agreeing to the settlement, and RMK relied on this appraisal along with several documents that McAlpin had obtained from Gahafer's

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[8] In her malpractice suit, McAlpin alleges that she would not have agreed to the settlement or to the language in the release "had it not been for the fear of losing the Estate's AOC stock and stock options for no compensation whatsoever, the erroneous and misleading statements from [Brandon], the extreme pressure of the continued threat of being held in contempt on Gahafer's pending motion, and the erroneous representations of the value of the company." Appellant's Br. at 29.

investigation to support McAlpin's allegation that Brandon, Gilfedder, and Nash committed malpractice in advising her to settle her claims against AOC. Indeed, McAlpin admits in her brief that the documents RMK is now relying upon to support McAlpin's malpractice claim are "the very documents which the District Court ordered to be returned to [the] Defendants." Appellant's Br. at 31; see also Appellant's Reply Br. at 2 (referring to the substance of various corporate documents seized from AOC by Gahafer in his capacity as AOC's receiver).

Aware that McAlpin was, in her malpractice action against her former attorneys, asserting claims of Robert Mock's stock ownership in violation of the Settlement Agreement, AOC and its co-defendants moved the district court on November 4, 1998, pursuant to Federal Rule of Civil Procedure 70,[9] to hold McAlpin in contempt of its dismissal

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[9] Rule 70, Judgment for Specific Acts; Vesting Title, provides, in pertinent part:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the

order and to divest McAlpin of any documents covered by the Agreement and the court's prior orders. In their motion, the defendants alleged that McAlpin had violated not only the express terms of the Settlement Agreement, but also the district court's orders of March 10, 1997,[10] July 18, 1997,[11] and September 24, 1997.[12] McAlpin objected to the defendants' motion to enforce, arguing that the district court lacked jurisdiction to grant the motion under the Supreme Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994). In an order entered on January 15, 1999, the district court held,

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> judgment. The court may also in proper cases adjudge the party in contempt . . . .

[10] Stating, in pertinent part, that "Receiver's counsel shall retain all copies of the Receiver's First Interim Report and the Receiver shall not disclose to anyone other than his counsel anything regarding the substance of his work as Receiver herein."

[11] Stating, in pertinent part, that "the Receiver shall return all documents taken from the defendant's premises, that the Receiver shall not disclose any document or portion thereof to anyone, and that any copies made shall also be returned to the defendants." The order also precluded McAlpin from deposing Gahafer and stated that "the Receiver shall not be required to produce any document or respond to any discovery herein."

[12] Dismissing the action with prejudice and stating, in pertinent part, that the "Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants, any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents which he may have obtained or generated as a result of the performance of his duties as Receiver."

over McAlpin's objections, that "[w]hile *Kokkonen* does in some ways limit the Court's jurisdiction in voluntary dismissal cases with regard to enforcement of a settlement agreement, the Supreme Court noted that Federal Rule of Civil Procedure 60(b)(6) permits the district court to re-open a case for 'any other reason justifying relief.'" The district court then considered what it termed the "Defendants' motion to re-open the above-styled action for the limited purpose of enforcing the Court's Orders and the terms of the settlement agreement" and ordered: (1) that McAlpin be held in contempt; (2) that McAlpin "transfer to the defendants any and all documents relevant to Appalachian Oil Corporation and/or any and all documents upon which a claim against the defendants could be based; (3) that McAlpin delete "any and all claims that Robert Mock owned any shares of Appalachian Oil Corporation in [her] malpractice complaint;" and (4) that the defendants be awarded "all attorney costs and expenses generated in their enforcement of the settlement agreement."

In response to the district court's January 15 order, which McAlpin asserts was entered without jurisdiction and in violation of due process because the district court did not hold an evidentiary or other hearing before holding her in contempt, McAlpin amended her malpractice claim to remove all direct references to Robert Mock and returned to the defendants non-privileged documents that McAlpin's counsel believed were relevant to AOC or upon which a claim against the defendants could be based. McAlpin's counsel then furnished the defendants with a privilege log identifying documents that were withheld from production under the district court's order.

McAlpin timely appealed the district court's January 15 order to the Sixth Circuit on the basis that the district court lacked jurisdiction to enforce the Settlement Agreement. Before the appeal was scheduled for hearing, however, the defendants filed a motion (entered April 1, 1999) for further contempt proceedings based on McAlpin's failure fully to comply with the order. Pursuant to this motion, the district court ruled, on May 3, 1999, that McAlpin had failed to comply with the court's January 15 order and that McAlpin would risk being held in further contempt if she did not file proof with the court of full compliance with the January 15 order within ten days of entry of the May 3 ruling. The district court further held that, based on paragraph 9 of the Settlement Agreement, McAlpin was barred from asserting any privileges that would allow her to retain any AOC-related documents. Finally, the court stated that its January 15 order directing McAlpin to delete from her malpractice complaint any claims referring to Robert Mock's stock in AOC required the removal not only of direct references to Mock, but of "any statement that infers or implies that Robert Mock owned any shares of AOC." On May 13, 1999, McAlpin filed a motion to stay the district court's proceedings pending an appeal to this panel. The district court granted McAlpin's motion on June 28, 1999, and the case was staying pending a decision by this court.

II

This court reviews de novo the district court's determination that it had subject matter jurisdiction to enforce the terms of the settlement agreement. *See Caudill v. North American Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000) (citing *Hilliard v. United States Postal Serv.*, 814 F.2d 325,

326 (6th Cir. 1987)). Subject matter jurisdiction may be independent or ancillary. Ancillary jurisdiction exists (1) to permit a court to dispose of factually independent claims and/or (2) to enable a court to manage its proceedings, vindicate its authority, and effectuate its decrees. *See Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 379-80, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994).

Appellate Jurisdiction

Although on August 11, 1999, a panel of this court denied the defendants' motion to dismiss this appeal for lack of jurisdiction, the defendants reassert in their brief that we cannot hear McAlpin's challenge to the district court's order holding her in contempt because that order was not a final, appealable judgment, but merely an enforcement of the district court's earlier rulings.

The motions panel properly denied the defendants' request to dismiss this appeal. In their motion to dismiss, the defendants first argued that the district court's order of civil contempt was not appealable under *Fox v. Capital Co.,* 299 U.S. 105, 81 L. Ed. 67, 57 S. Ct. 57 (1936), in which the Supreme Court held that, "except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt."[13] As the motions

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[13] The continuing viability of the holding in Fox was called into question in *Byrd v. Reno,* 336 U.S. App. D.C. 363, 180 F.3d 298, 300 (D.C. Cir. 1999).

panel noted in rejecting this argument, Fox does not preclude review of civil contempt orders generally; the rule articulated in Fox simply stands for the proposition that a "judgment of civil contempt is not [itself] a final decree," and therefore is not appealable in the absence of a final judgment. *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976). As this court explained in *Peabody Coal Co. v. Local Union Nos. 1734, 1508 and 1548, UMW*, 484 F.2d 78 (6th Cir. 1973), "all that is required is that a final order exist, so that the policy of preventing piecemeal litigation is served." *Id.* at 82. As the motions panel correctly observed, in this case "the order of civil contempt was entered post-judgment on a reopening of the action for the purpose of reconsidering the contempt motion. Thus, the concern that it represents an interlocutory order is not present."

The motions panel also properly rejected the defendants' second argument against appellate jurisdiction - that the district court's January 15 order holding McAlpin in contempt was not a new order, but merely an enforcement of the requirements that the court imposed on McAlpin in the course of the underlying litigation. In support of their position, the defendants cited *Whittington v. Milby*, 928 F.2d 188 (6th Cir.), *cert. denied*, 502 U.S. 883, 116 L. Ed. 2d 192, 112 S. Ct. 236 (1991), in which this court held that the "mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Id.* at 191. The defendants' argument lacks merit. The district court's January 15 order was more than a reentry or "immaterial" revision of one of the court's earlier orders. This panel therefore has jurisdiction to determine whether the district court exceeded the scope of its authority in holding McAlpin in contempt.

The District Court's Jurisdiction to Issue the 1999 Orders

Because the district court held McAlpin in contempt of settlement terms that were not incorporated into any of the court's orders, we must determine whether the district court had jurisdiction to enforce the settlement agreement in its entirety and, if not, whether the district court's contempt judgment was within the scope of its jurisdiction to enforce its prior orders against the parties.

Jurisdiction to Enforce the Settlement Agreement

Although it had already dismissed the parties' suit with prejudice and stricken the case from its docket, the district court cited Federal Rule of Civil Procedure 60(b)(6) as authority for enforcing the Settlement Agreement against McAlpin. Rule 60(b)(6) may, in certain circumstances, [*501] be used to provide a party with relief from a judgment of dismissal. However, in this case the district court erred in construing Rule 60(b) as a broad exception to the Supreme Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994), in which the Court held that a federal district court lacks jurisdiction to enforce a settlement agreement terminating litigation unless the court "expressly retained jurisdiction to enforce the settlement agreement" or "incorporated the terms of the settlement into the dismissal order." *Id.* at 380-81. When read in conjunction with the dismissal order in this case, Kokkonen precludes the district court from enforcing any provisions of the Settlement Agreement that were not expressly incorporated into an order entered while the case was still pending on the court's docket.

In *Kokkonen*, the Supreme Court held that the district court in which the case was settled did not have jurisdiction to enforce the provision of the settlement agreement requiring the petitioner to return certain files to the respondent because the district court did not expressly retain jurisdiction over enforcement of the agreement or incorporate the agreement's terms in its dismissal order. *See Kokkonen*, 511 U.S. at 377 (noting that the district court's dismissal order "did not so much as refer to the settlement agreement"). Writing for the Court, Justice Scalia explained that the district court erred in enforcing the agreement pursuant to its "inherent supervisory power" over the case because federal courts are "courts of limited jurisdiction" and "neither [Fed. R. Civ. Proc. 41(a)(1)(ii)] nor any [other] provision of law provides for jurisdiction of the court over disputes arising out of an agreement that produces the stipulation [to dismiss the case]." *Id.* at 378.

The Court proceeded to explain that ancillary jurisdiction to enforce a settlement agreement cannot be premised on a "relationship so tenuous as the breach of an agreement that produced the dismissal of an earlier federal suit." *Id.* at 380 (stating that ancillary jurisdiction exists for "two separate, though sometimes related purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees" (citations omitted)). As the Court observed in rejecting the district court's attempt to enforce the settlement agreement on the basis that it had ancillary jurisdiction to "protect its proceedings and vindicate its authority":

> [T]he only [relevant] order [issued by the district court] was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal - either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here. The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order.

Id. at 380-81 (noting that, when a case is dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2), "the parties' compliance with the terms of the settlement contract (or the court's 'retention of jurisdiction' over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order").

Of course, the facts in this case support the district court's exercise of jurisdiction to a greater extent than did the facts at issue in *Kokkonen*. In this case, unlike in *Kokkonen*, the district court's order of dismissal did mention the settlement agreement, and noncompliance with the agreement

would arguably "flout[] and imperil[]" the district court's orders directing that all documents seized by Gahafer be returned to AOC.[14] However, this court has joined other circuits in strictly applying the holding in *Kokkonen*. Thus, the district court's incorporation in its dismissal order of only one term of the Settlement Agreement (which term does not, on its face, apply directly to McAlpin) is insufficient to confer jurisdiction over the entire agreement. In *Caudill v. North American Media Corp.*, 200 F.3d 914 (6th Cir. 2000), this court joined the Third and Eighth Circuits in holding that an order dismissing a case "pursuant to the terms of the parties' settlement agreement" does not provide a district court with ancillary jurisdiction to enforce the agreement under *Kokkonen*. *See id.* at 917 (stating that "the phrase 'pursuant to the terms of the Settlement' fails to incorporate the terms of the Settlement Agreement into the order") (quoting *In re Phar-Mor, Inc., Securities Litigation*, 172 F.3d 270, 274 (3d Cir. 1999) (quoting *Miener v. Missouri Dep't of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995))). In *Caudill*, this court flatly rejected the district court's attempt to distinguish *Kokkonen* and enforce the parties' settlement agreement on the basis that its final order dismissed the case "pursuant to the terms of the parties' agreement," whereas the dismissal order in *Kokkonen* "did not so much as refer to the settlement agreement." *Caudill*, 200 F.3d at 917. AOC's first argument

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[14] Although the statement in the court's March 10, 1997, concerning the return of confidential documents to AOC is directed primarily at Gahafer, the portion of the order directing that "any copies made shall also be returned to the defendants" is written in the passive voice and could possibly be construed to bind McAlpin. *See infra* p. 25.

in support of the district court's jurisdiction has thus already been rejected in this circuit. *See ibid.*; *see also Downey v. Clauder*, 30 F.3d 681, 684 (6th Cir. 1994) (finding, based on a strict application of the holding in *Kokkonen*, that the district court lacked jurisdiction to enforce the parties' settlement agreement because it failed specifically to "retain jurisdiction over enforcement of the agreement when entering judgment"); *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996) (noting that the appellant could not seek contempt sanctions against the appellee immediately "as he would have been able to had the district court retained jurisdiction or incorporated the [parties'] settlement agreement into the order of dismissal").

It is well settled that "[t]he mere reference in [a dismissal] order to [a settlement] Agreement does not incorporate the Agreement into the order." *Scelsa v. City University of New York*, 76 F.3d 37 (2d Cir. 1996) (rejecting the district court's attempt to enforce a settlement agreement referenced in the court's dismissal order on the basis that *Kokkonen* only permits jurisdiction where the "Dismissal Order expressly reserve[s] authority to enforce the Agreement, or incorporate[s] the Agreement into the order"). Because this court has joined other circuits in strictly applying *Kokkonen's* relatively narrow interpretation of a district court's ancillary jurisdiction to enforce settlement agreements terminating litigation, the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement.

Nor can Rule 60(b)(6) be used to support the district court's attempt to enforce provisions of the settlement

agreement not expressly incorporated in the dismissal order. Relief from a final judgment under Rule 60(b) is an "extraordinary remedy that is granted only in exceptional circumstances." *Dickerson v. Board of Educ. of Ford Heights.*, 32 F.3d 1114, 1116 (7th Cir. 1994); *see also Neuberg*, 123 F.3d 951, 955 (noting that "nothing in *Kokkonen* purports to change the stringent standards that govern the availability of relief under Rule 60(b)(6)"). Rule 60 provides in pertinent part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6).

As the Supreme Court acknowledged in *Kokkonen*, some circuits have held that a dismissed suit can be reopened under Federal Rule of Civil Procedure 60(b)(6) by reason of breach of the agreement terminating the litigation. *See Kokkonen*, 511 U.S. at 378. However, the Court went on to observe that "[e]nforcement of [a] settlement agreement,. . . whether through award of damages or decree of specific performance, *is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.*" *Ibid.* (emphasis added). In this case, the district court sought to enforce specific provisions of the Settlement Agreement by holding McAlpin in contempt of court and by

ordering her to perform specific acts. The district court's contempt order was clearly "more than just a continuation or renewal of the dismissed suit," and affirming the district court's reliance on Rule 60(b)(6) would create an exception to the holding in *Kokkonen* that would swallow the rule, giving the district court the type of broad enforcement jurisdiction that the *Kokkonen* Court reserved to courts that either specifically retain jurisdiction to enforce a settlement agreement or that expressly incorporate the terms of the agreement in a valid and enforceable order. *Ibid.*

Contrary to the defendants' assertion, the determination by some courts that (1) "repudiation of a settlement agreement that terminates litigation pending before a court constitutes an extraordinary circumstance" justifying relief under Rule 60(b)(6), and (2) that *Kokkonen* permits parties to "revive a suit under Rule 60(b)(6) when a settlement agreement has been breached," *Leal v. Town of Cicero,* 2000 U.S. Dist. LEXIS 8144, 2000 WL 765085 (N.D. Ill.), at *3 (citing *Keeling v. Sheet Metal Workers Int'l Assoc.,* 937 F.2d 408, 410 (9th Cir. 1991)), is simply not supported by *Kokkonen's* text or the manner in which the federal courts of appeals have applied the case. *See Kokkonen,* 511 U.S. at 380-81; *Neuberg,* 123 F.3d at 955. In Neuberg, for example, the Seventh Circuit affirmed the district court's refusal to interpret or enforce the parties' settlement agreement pursuant to Rule 60(b) because, like the defendants in this case, the moving parties "were not really trying to reopen the dismissed suit, which would be the effect of a Rule 60(b)(6) motion setting aside the final judgment," but were instead trying to get the judge to "interpret the agreement, giving them the benefit [of their bargain]." *Id.* at 955; *see also National Presto Indus., Inc. v. Dazey Corp.,* 107 F.3d 1576,

1583 (Fed. Cir. 1997) (noting that a district court retains no inherent authority to enforce or interpret a settlement contract terminating the litigation). As this court held in *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987), seven years before *Kokkonen* was decided, a district court that unconditionally dismisses an action with prejudice and does not attempt to retain jurisdiction to enforce the parties' settlement agreement cannot enforce the agreement because the "unconditional dismissal with prejudice terminates the district court's jurisdiction except for the *limited purpose* of reopening and setting aside the judgment of dismissal within the scope allowed by Rule 60(b)." *Id.* at 995-96 (emphasis added).

In addition to the substantive problems associated with the district court's reliance on Rule 60(b) as the basis for ancillary jurisdiction over the Settlement Agreement, the defendants' failure to move the district court for relief pursuant to the Rule (the defendants brought their motion for contempt and for enforcement of the Agreement pursuant to Federal Rule of Civil Procedure 70), undermines the district court's interpretation of Rule 60(b) in its January 15 order. *See* Fed. R. Civ. P. 60(b) (stating that relief must be sought "on motion" by the aggrieved party); *Kalt v. Hunter*, 66 F.3d 1002, 1006 (9th Cir. 1995) (refusing to grant relief pursuant to Rule 60(b)(6) because the party seeking enforcement of the settlement agreement "did not seek Rule 60(b)(6) relief" but instead pled an "independent action seeking equitable relief" without "satisfying his burden of establishing federal court jurisdiction") (citing *Kokkonen*, 511 U.S. at 378)).

In this case, the district court's failure expressly to retain jurisdiction over the Settlement Agreement or to

incorporate more than one of the settlement terms in its dismissal order precludes it from enforcing unincorporated terms against the parties. The portions of the district court's January 15 and May 3, 1999, orders directing McAlpin to comply with paragraphs 8 and 9 of the Settlement Agreement are therefore invalid. However, the district court may on remand uphold the portions of the orders directing McAlpin to return confidential documents to the defendants if the court determines that its 1997 rulings directing Gahafer to return all documents seized during his receivership also bound McAlpin, either directly or because she was complicit in the retention of the documents at issue.

Jurisdiction to Enforce Prior Orders

Although Article III limits a district court's jurisdiction to enforce the terms of a settlement agreement, the district court always has jurisdiction to enforce its own orders. *See Kokkonen*, 511 U.S. at 380-81 (stating that a court has ancillary jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its decrees" and thus has ancillary jurisdiction to enforce a settlement agreement incorporated in a court order because "breach of the agreement would be a breach of the order"); *American Town Center v. Hall 83 Assocs.*, 912 F.2d 104, 110 (6th Cir. 1990) (reaffirming the well-established rule that, if a court has jurisdiction over the substance of a litigation, it has jurisdiction to enforce the judgment it renders). Thus, the directives in the district court's January and May 1999 orders may be upheld to the extent that they are consistent with the terms of any order issued by the district court prior to dismissal of McAlpin's case.

McAlpin argues that the district court erred in holding her in contempt of its 1997 orders directing the return of confidential documents to AOC because those orders were directed only to Gahafer, and that "even if the orders could be artfully construed to imply that [she] was required to perform a specific act," the defendants failed to establish "by clear and convincing evidence that [she] violated any of the[ ] orders." Appellants Br. at 43; *see also EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n,* 753 F.2d 1172, 1178 (2d Cir. 1985), *aff'd* 478 U.S. 421, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986) (holding that a party may only be held in contempt of a court order if (1) the order clearly and unambiguously imposed an obligation on the party; (2) proof of the party's noncompliance with the order was clear and convincing; and (3) the party did not diligently attempt to comply with the order). Although the district court's 1997 orders do not specifically refer to McAlpin, it is possible to construe them, and in particular the portion of the March 10, 1997, order providing that "any copies made [of confidential AOC documents] shall also be returned to the defendants," as binding all parties to the litigation, not just Gahafer. See *Lucille v. City of Chicago,* 31 F.3d 546, 548-49 (7th Cir. 1994) (stating that a federal court will enforce or retain jurisdiction over a settlement agreement only to the extent that the court's judgment expressly or implicitly incorporates the terms of the agreement). However, because "there are few persons in a better position to understand the meaning of an order . . . than the district judge who ordered it," we will not decide whether the March 1997 mandate binds McAlpin, but will instead remand the issue to the district court for a determination concerning the scope of the order. *Scelsa v. City Univ. of New York,* 76 F.3d 37, 42 (2d Cir. 1996); *cf. Neuberg,* 123 F.3d at 955 (noting that, "as the judge who had

presided over the waning years of [the underlying] lawsuit," the district judge was in the "best position to evaluate the settlement agreement . . . and whether the Neubergs were entitled to [relief thereunder]").

III

The Supreme Court's opinion in *Kokkonen* precludes the district court from enforcing portions of the Settlement Agreement that were not expressly incorporated in either its dismissal order or in its prior orders against the parties. The defendants' proper remedy for these violations lies in a separate action for breach of the Settlement Agreement, in which suit the defendants could also request a preliminary injunction enjoining McAlpin from proceeding with her malpractice action to the extent that her case depends on claims she promised to abandon under the Agreement. *See Downey*, 30 F.3d at 687 (stating that because the district court "failed to retain jurisdiction over enforcement of the [parties' settlement] agreement when entering judgment, [the defendant's] breach of contract claim was properly addressed in a separate proceeding"). The district court may, however, enforce its orders concerning the return of confidential corporate documents against McAlpin if the court determines on remand that those orders bind McAlpin as well as Gahafer.

A proper reading of the Supreme Court's opinion in *Kokkonen* compels the conclusion that the district court lacked jurisdiction to enforce terms of the Settlement Agreement that were not expressly incorporated in its dismissal or other orders. The portions of the district court's January and May 1999 rulings directing McAlpin to comply with paragraphs 8 and 9 of the Settlement Agreement are therefore invalid.

Whether the portions of the orders pertaining to the return of AOC documents may be enforced against McAlpin depends on whether the district court's March 10 and September 24, 1997, orders concerning the return of confidential documents can be construed to bind her even though they expressly refer only to Gahafer. Because the district court is in the best position to determine the scope and meaning of these orders, we **REVERSE** the judgment holding McAlpin in contempt of court and **REMAND** the case for further proceedings consistent with this opinion.

CONCURRENCE

HARRY W. WELLFORD, Circuit Judge, concurring. I concur in the opinion of Judge Boggs, but add a few comments that seem appropriate.

The district court's initial order naming Gahafer as Appalachian Oil Company's ("AOC") receiver was unfortunate and ill-advised, especially without the posting of a proper receiver's bond adequately to protect AOC in the even of the receiver's improper or unauthorized actions. This regrettable action has engendered multiple court filings, great expense to the parties, and recriminations. I am not sure that Gahafer himself did not engender some of these problems, and an examination of his actions might show his awareness that a proper and substantial bond was never posted to protect AOC. It was further regrettable that this receivership action was taken without a contemporaneous hearing.

It would appear, furthermore, that Gahafer's actions, vis-a-vis McAlpin seeking large fees, were taken with knowledge that plaintiffs had few, if any, assets to satisfy his

claim and that such action might force a settlement with AOC by his former "clients."

If McAlpin is correct that the original contempt order was entered against her without a hearing, I would question the propriety of the district court's action in that regard. In any event, pursuant to the opinion and holding under *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994), all of the actions of the district court seeking to enforce other provisions of the settlement agreement would be of no effect as being without jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 5, 2000]

No. 99-5281

DOTTIE RENEE MCALPIN,
Plaintiff-Appellant,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., a Kentucky corporation; MARIE MILLS, as Administratrix of the Estate of Vance Mills; BECKHAM GARLAND; APPALACHIAN OIL CORPORATION, a Kentucky corporation; G&M OIL COMPANY, INC., a Kentucky corporation; B&V REALTY CORPORATION,
Defendants-Appellees.

Before: KRUPANSKY, WELLFORD, and BOGGS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Pikeville

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court holding plaintiff Dottie Renee McAlpin in contempt of court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

[Filed February 19, 1997]

No. 97-72

DOTTIE RENEE McALPIN, of Lexington, Kentucky, Individually as ADMINISTRATRIX OF THE ESTATE OF ROBERT MOCK and as a Shareholder on Behalf of APPALACHIAN OIL CORPORATION, a Kentucky corporation,
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., a Kentucky corporation, MARIE MILLS, ADMINISTRATRIX OF THE ESTATE OF VANCE MILLS, BECKMAN GARLAND, APPALACHIAN OIL CORPORATION, a Kentucky corporation, G & M OIL

COMPANY, INC., a Kentucky)
corporation, B & V REALTY)
CORPORATION,)
Defendants.)
)

TEMPORARY RESTRAINING ORDER

This matter is before the Court on plaintiff's *ex parte* motion for a temporary restraining order. The Court has reviewed the records, and being otherwise sufficiently advised,

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That plaintiff's *ex parte* motion for a temporary restraining order is GRANTED;

2. That the defendants herein are hereby temporarily RESTRAINED from destroying, altering, and/or concealing any documents or records; and are ORDERED to temporarily preserve all assets of Appalachian Oil Corporation (AOC).

3. That in order to insure enforcement of this temporary restraining order, Mr. Morris Gahafer is hereby appointed as temporary receiver of Appalachian Oil Corporation and his duties as temporary receiver shall be to perform the functions necessary to see that the lawful day-to-day operations of Appalachian Oil Corporation are carried out without disruption in accordance with the Kentucky common law and K.R.S. Chapter 271B and the United States Code.

Mr. Gahafer is further authorized to employ legal counsel, certified public accounts or other business related assistants or consultants to assist him in the performances of his duties as receiver herein and further is specifically authorized to use the funds of Appalachian Oil Corporation to pay reasonable fees for these legal and business consultants.

4. The plaintiff had offered as security in this matter, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, the bond of Mr. Morris Gahafer, maintained by Ohio Casualty in the amount of $500,00.00. The Court finds that this bond is adequate for the payment of any costs and damages that may be incurred by Appalachian Oil Corporation should that corporation be subsequently found to have been wrongfully enjoined or restrained.

5. This temporary restraining order is issued and shall be effective from the hour of 12:19 p.m. on the 19th day of February, 1997 until the hour of 4:00 p.m. on the 4th day of March, 1997, [in Pikeville, Kentucky] at which time this matter shall come on for hearing before this Court on plaintiff's motion for a preliminary injunction.

6. This temporary restraining order is issued to prevent the destruction, alteration, and/or concealment of documents and records that may be evidence relevant to this case, and further to preserve all assets of AOC. The destruction, alteration, and/or concealment of these documents and records would, according to the plaintiff, result in immediate and irreparable injury, loss or damage to the plaintiff since such documents and records constitute much of the proof that plaintiff plans to offer.

7. This temporary restraining order was granted without notice based upon plaintiff's assertions that any prior notice to the defendants would likely have resulted in the destruction, alteration or concealment of relevant documents and/or records.

8. This temporary restraining order is binding upon the parties to this action, their officers, agents, servants, employees, and attorneys. This temporary restraining order is also binding upon any person or persons in active concert or participation with any of the above listed individuals, if such person or persons receive actual notice of this temporary restraining order by personal service or otherwise.

9. The agents, servants, directors and officers or other employees of Appalachian Oil Corporation are ordered to cooperate with Mr. Morris Gahafer in his performance of duties as receiver herein.

10. The United States Marshal Service is hereby ordered to accompany Mr. Morris Gahafer to the headquarters of Appalachian Oil Corporation, where ever it may be found in the Eastern District of Kentucky, to serve this order upon any director, officer or managing agent or custodian of records or assets of Appalachian Oil Corporation. The United States Marshal Service shall be compensated at their standard rate for travel, service and enforcement of this order.

Entered this 19th day of February, 1997.

/s/_____
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed March 5, 1997]

No. 7:97-CV-00072

DOTTIE RENEE MCALPIN, of Lexington, Kentucky, Individually as ADMINISTRATRIX OF THE ESTATE OF ROBERT MOCK and as a Shareholder on Behalf of APPALACHIAN OIL CORPORATION, a Kentucky corporation,

Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., a Kentucky corporation, MARIE MILLS, ADMINISTRATRIX OF THE ESTATE OF VANCE MILLS, BECKMAN GARLAND, APPALACHIAN OIL CORPORATION, a Kentucky corporation, G & M OIL

COMPANY, INC., a Kentucky)
corporation, B & V REALTY)
CORPORATION,)
Defendants.)
)

ORDER

This matter having come before the Court for a hearing on March 4, 1997, counsel for the Plaintiff, Defendants, Receiver and Surety for Receiver having been heard and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED as follows:

1) The Defendants' motion to forfeit the receiver's bond is OVERRULED.

2) The receiver's bond with Aetna Casualty & Surety Company serving as surety is approved by this Court.

3) The plaintiff shall on or before March 5, 1997, at 4:00P.M., file with the Court a bond pursuant to FRCP 65(c) in the amount of $500,000.00 with surety which bond shall be for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. If the plaintiff fails to post the bond as required by this paragraph, the Temporary Restraining Order issued by this Court on February 19, 1997, shall be dissolved.

4) Immediately after the plaintiff has filed the bond as required by the preceding paragraph, the defendants shall permit the receiver to interview Mr. Tony Todd and Mr. Jerry Garland for the purpose of allowing the receiver to inquire and attempt to clarify certain transactions and entries reflected in the records of Appalachian Oil Corporation. This interview shall be conducted no later than the morning of March 6, 1997, and shall be limited to two (2) hours.

5) Provided that the plaintiff has filed the bond required by paragraph 3 above, the receiver shall prepare for the Court a balance sheet showing the assets and liabilities of Appalachian Oil Corporation as of February 21, 1997, which was the date the receiver commenced performance of his duties in connection with that company.

6) Provided that the plaintiff has filed the bond as required by paragraph 3 above, the Temporary Restraining Order issued by this Court on February 19, 1997, shall continue in effect from day to day through March 6, 1997, at 1:00 p.m., at which time this matter is scheduled for a further hearing before this Court.

This the 5th day of March, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: 3/5/97

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed March 10, 1997]

No. 97-72

DOTTIE RENEE MCALPIN, of Lexington, Kentucky, Individually as ADMINISTRATRIX OF THE ESTATE OF ROBERT MOCK and as a Shareholder on Behalf of APPALACHIAN OIL CORPORATION, a Kentucky corporation,
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., a Kentucky corporation, MARIE MILLS, ADMINISTRATRIX OF THE ESTATE OF VANCE MILLS, BECKMAN GARLAND, APPALACHIAN OIL CORPORATION, a Kentucky corporation, G & M OIL

COMPANY, INC., a Kentucky)
corporation, B & V REALTY)
CORPORATION,)
Defendants.)
)

ORDER

This matter having come before the Court on March 6, 1997, counsel for Plaintiff, Defendants, Receiver and Receiver's Surety having been heard, and the Court being sufficiently advised,

IT IS HEREBY ORDERED as follows:

1. The Plaintiff having failed to post a Temporary Restraining Order Bond by 4:00 p.m. on March 5, 1997, the Temporary Restraining Order entered herein on February 19, 1997 is dissolved and Plaintiffs' Motion for Temporary Injunction is denied.

2. The Plaintiff shall pay all fees and expenses incurred by the Receiver which total $28,640.92 as of March 6, 1997, plus any additional fees or charges hereinafter incurred by the Receiver for the collection of this sum.

3. The receivership of Appalachian Oil Corporation is hereby dissolved and the Receiver, Morris Gahafer, is relieved of any further responsibilities with respect to said receivership. Receiver's counsel shall retain all copies of the Receiver's First Interim Report and the Receiver shall not disclose to anyone other than his counsel

anything regarding the substance of his work as Receiver herein.

4. The Receiver's Bond is released and the Receiver's Surety, Aetna Casualty & Surety Company, is relieved of any further obligations herein.

Dated this the 10th day of March, 1997.

/s/_____
JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT PIKEVILLE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by mail, upon the following, this 10th day of March, 1997.

Gregory P. Parsons
250 West Main Street
Suite 2300
Lexington, Kentucky 40507
Telephone: (606) 226-2300
ATTORNEYS FOR COURT-APPOINTED RECEIVER AND HIS SURETY

Gary Napier, Esq.
Reece & Jensen, PLLC
400 South Main Street
P.O. Drawer 5087
London, Kentucky 40756-5087

ATTORNEYS FOR DEFENDANTS

Douglas C. Brandon, Esq.
112 North Upper Street
Lexington, Kentucky 40507
ATTORNEY FOR PLAINTIFF

Bob Slepecky
Bond Claims Manager
Aetna
1660 West Second Street
Suite 500
Cleveland, Ohio 44133

/s/_____
CLERK, UNITED STATES
DISTRICT COURT

By: /s/_____
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed July 18, 1997]

Civil Action No. 97-72

DOTTIE RENEE McALPIN,
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., ET AL.,
Defendants.

ORDER

This matter is before the Court upon several motions. The plaintiff has moved [Record No. 35] the Court to alter or amend its Order [Record No. 24] dated March 10, 1997. The defendants have also moved [Record No. 37] the Court to alter or amend that Order. The Court-appointed Receiver, Morris Gahafer ("Receiver"), has in return moved [record No. 43] the Court for an order striking the above-referenced motions to alter or amend and for an order directing the

plaintiff to show cause why it has failed to pay the Receiver as ordered in that March 10, 1997, Order.

Further, the plaintiff has recently moved the Court [Record No. 50] to hold the defendants' motion to dismiss and motion for order of transfer in abeyance until after the deposition of the Receiver in this matter. The Receiver has responded with a motion for protective order [Record No. 51]. The defendants have also responded with a motion for protective order [Record No. 53]. These matters are now ripe for decision.

First, as to the Court's March 10, 1997, Order, the Court acknowledges that the Order did not entirely reflect the determinations made at the hearing on March 6, 1997 [Record No. 22]. At that hearing, the Court did indeed rule that the Receiver shall return all documents taken from the defendants' premises, that the Receiver shall not disclose any document or portion thereof to anyone, and that any copies made were also to be returned to the defendants. In its Order, however, the Court failed to specify such language. Accordingly, the Court will grant the defendant's motion to amend the Order to reflect the rulings at the hearing.[1]

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[1] The Court declines to strike said motion. When a party finds an error in a court opinion or order, a party may move the court to alter or amend that opinion and order; the order need not be a final and appealable judgment to do so. *See* Fed. R. Civ. P. 54(b) ("[T]he order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.")

The Court agrees with the Receiver that the Order was not

The Court, however, declines to alter or amend the Order as requested by the plaintiff.[2] The Court made it very clear at the hearing that the Receiver's costs were to be paid by the plaintiff. The plaintiff has put forth no new or compelling reason for the Court to change its decision; thus, the plaintiff shall pay said costs immediately. Because the plaintiff made said motion to alter or amend, the Court will grant the plaintiff leeway and will deny the Receiver's motion to show cause. Obviously, the plaintiff did not want to pay the Receiver until the Court had definitely ruled that the plaintiff was to pay such costs. That ruling is here- the plaintiff shall not delay any further, but shall pay the Receiver post haste.

As to the plaintiff's motion to hold this matter in abeyance, although the Court adheres to the principle that a case should be decided on the merits by affording all sides an opportunity to address the issues before the Court, the Court finds this motion not well taken. The plaintiff should realize that any testimony that could be elicited through the deposition of the Receiver would be considered hearsay and would not be admissible to support or counter the motion to dismiss and to transfer. Moreover, the Court will not allow the Receiver to incur any more expenses at the hand of the plaintiff, especially in light of the fact that the plaintiff has

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a final, appealable judgment, that the defendants' motion was made fourteen days after the Order and that Fed. R. Civ. P. 59 specifies that a motion to alter or amend must be filed within ten (10) days of the Judgment. Because, however, an Order may be altered or amended under Fed. R. Civ. P. 54(b), the Court is not confined to the ten (10) day, appealable judgment rule.

[2] See footnote 1.

delayed payment to the receiver by her unfounded motion to alter or amend, asking the Court to relieve her of the duty of paying the Receiver.[3] Accordingly,

IT IS ORDERED:

(1) that the plaintiff's motion to alter or amend [Record No. 35] the Court's Order Sated March 10, 1997, be, and the same hereby is, **DENIED**.

(2) that the defendants' motion to alter or amend [Record No. 37] the Court's Order dated March 10, 1997, be, and the same hereby is, **GRANTED**; the Order shall be **AMENDED** to reflect that the Receiver shall return all documents taken from the defendants' premises, that the Receiver shall not disclose any document or portion thereof to anyone, and that any copies made shall also be returned to the defendants.

(3) that the Receiver's motion to strike and for show cause [Record No. 43] be, and the same hereby is, **DENIED**; however, the Court having denied the plaintiff's motion to alter or amend, the plaintiff is now **DIRECTED** to pay the Receiver within ten (10) days of the entry of this Order.

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[3] The plaintiff notes that the Receiver's cost should be paid by Appalachian Oil Corporation. While the plaintiff may think that it is unfair for her to bear "the financial burden of payment for his services", such opinion does not give the plaintiff leave to disregard a court order. Thus, the plaintiff shall take note of this and shall pay the costs accordingly.

(4) that the plaintiff's motion [Record No. 50] for an Order holding the case in abeyance be, and the same hereby is, **DENIED;**

(5) that the motions for a protective order by the Receiver and the defendants [Record Nos. 51 & 52] be, and the same hereby are, **GRANTED**. The plaintiff **SHALL NOT** take the Receiver's deposition, said subpoena is quashed, and the Receiver shall not be required to produce any document or respond to any discovery herein.

This the 18th day of July, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: July 21, 1997

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed September 2, 1997]

CIVIL ACTION NO. 97-72

DOTTIE RENEE McALPIN,
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., ET AL.,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon several motions. The defendants have moved [Record No. 35] the Court to dismiss this action [Record No. 31]., or in the alternative to transfer the action to the London division [Record No. 33].

The plaintiff has moved [Record No. 66] the Court for leave to file her response to the motion to dismiss out of time.[1] In response, the defendants have moved [Record No. 69] to strike the plaintiff's motion to file her response out of time. Lastly, the court-appointed Receiver has moved the Court [Record No. 63] to hold the plaintiff in contempt for failing to obey the Court's Orders, and the defendants have moved the Court [Record No. 70] to dismiss the action instead, pursuant to Fed. R. Civ. P. 41(b), for failure to abide by the Court's Orders.

These matters being fully briefed, they are now ripe for decision. Having reviewed the record and the memoranda submitted by the parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The plaintiff, as administratix of the estate of Robert T. Mock and as shareholder of the defendant, Appalachian Oil Corporation ("AOC"), brings this action, claiming that the defendants have engaged in various alleged wrongful, fraudulent and illegal transactions. Such transactions allegedly constitute a pattern of racketeering which supports a claim under the civil RICO statute, 18 U.S.C. § 1961-1968. Moreover, through such transactions, the defendants have allegedly breached their fiduciary duties to the plaintiff. Thus,

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[1] The plaintiff, however, failed to request leave to file the response to the motion to transfer out of time; instead, the plaintiff filed the response as a matter of course.

the plaintiff brings forth this action, stating that the defendants' violation of various federal and state laws have harmed her as a shareholder of AOC. Accordingly, she seeks judgment against the defendants, resulting in payment of damages, issuance of an alleged stock option, and divestment of the defendants in AOC.

Interestingly, however, the transactions which the plaintiff puts forth in her complaint to support both her RICO and fiduciary duty causes of action were previously pled in 1983 and 1986 state court actions filed by her predecessors-in-interest, Robert T. Mock and Dottle C. Mock, as administratrix of the estate of Robert T. Mock. The only real difference in those complaints is that those complaints did not set forth a RICO cause of action and that she submits that some of the alleged wrongful, fraudulent, and illegal actions are still ongoing today.

The Court cannot consider these matters barred due to res judicata, however, because-apparently no state court has ruled upon or dismissed such claims with prejudice.[2] Thus, the Court must look to the merits of the matter in this action,

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[2] The 1983 action was dismissed by the Pulaski Circuit Court due to improper venue. The 1986 action was dismissed by the Knox Circuit Court for lack of prosecution. On appeal, the Kentucky Court of Appeals held that i5 was dismissed without prejudice. However, it is the Court's understanding that that decision is currently on appeal before the Kentucky Supreme Court. Lastly, in 1988, the plaintiff again tried to bring a state court action in Pulaski Circuit Court-, but voluntarily dismissed the action after realizing Chat her father's 1983 complaint had previously been dismissed due Co improper venue.

and accordingly will address each motion referred to in the introduction.

CONCLUSIONS OF LAW

I. Motion for Leave to Respond and Motion to Strike the Plaintiff's Response

The defendants have moved the Court to strike the plaintiff's motion for leave to respond to their motion to dismiss. The defendants argue that the plaintiff has been continually dilatory requesting additional time to respond in this matter four (4) times. The defendants highlight,

> The plaintiff has ignored nearly every order the Court has issued. She didn't obtain a bond when the TRO implicitly ordered her to do this, she didn't obtain a bond when the Court expressly ordered her to do this, she has not paid the Receiver's fees although she has been ordered twice now to do so, she has failed to file her pleadings when ordered to do so by the Court.

Defendants' Memorandum in Support of Motion to Strike at p. 5. Thus the defendants insist that the motion and subsequent response should not be allowed.

Admittedly, the plaintiff has not been particularly responsive to the Court's directions; however, as the defendants admit in their motion to strike, the plaintiff requested, before her response time had technically run due to several extensions having been granted, that this matter be

stayed pending discovery. Consequently, the plaintiff has not technically been dilatory in her response as the plaintiff was obviously waiting for a ruling on the motion to stay before submitting her response. Thus, the Court finds that her motion for leave to respond is acceptable, and therefore, will grant her motion for leave to respond out of time and will deny the defendants' motion to strike.

II. Motions to Dismiss

Although the Court might well dismiss the plaintiff's claims, pursuant to Fed. R. Civ. P. 41(b), for the plaintiff's failure to abide by the Court's Order directing her to pay the Receiver, the Court will not dismiss on this mere technicality, but will instead dismiss on the merits.

A. Plaintiff's RICO Claim

A civil RICO claim requires that the cause of action be filed within four years of the time from which the plaintiff knew or should have known of the alleged pattern of racketeering and "the existence and source of [her] injury." *Caproni v. Prudential Sec. Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994). Based on the 1983 complaint which sets forth the same alleged wrongful, fraudulent, and illegal transactions, the plaintiff clearly knew that she, as administratrix and as successor-in-interest to the AOC shares, had been injured and that such injury resulted from the many transactions which she claims form a pattern of racketeering. Accordingly, such knowledge having been in existence in 1983, this 1997 action is clearly barred by RICO's four-year statute of limitations. *See id.*; *Agristor Fin. Corp v. Van Sickle*, 967 F.2d 233, 24142 (6th Cir. 1992); *see also Agency Holding Corp. v,*

Malley-Duff & Assocs., Inc., 483 U.S. 143, 107 S.Ct. 2759, 2767 (1987) (adopting a four-year statute of limitations for a civil RICO cause of action).

The plaintiff, however, attempts to circumvent the four-year statute of limitations by (1) stating that the acts have continued into the present and (2) that the doctrine of fraudulent concealment tolls the statute of limitations from running. The plaintiff, however, presents no support for the tolling argument, except to cite this Court's ruling in *Coal-Mac. Inc. v. JRM Coal Co., Inc.*, 743 F. Supp. 499 (E.D. Ky. 1990), and to state that the ,"defendants are masters of evasion and concealment." Be it as that may, the plaintiff clearly has had knowledge of these transactions enough to know that the defendants were allegedly engaged in a pattern of conduct which was injuring AOC shareholders, particularly her father, the predecessor-in-interest to her shares in AOC. Although the plaintiff may not have all the facts she needs to prove that the defendants have been doing such wrongful acts, such actions were overt enough to cause her father to bring forth a cause of action nearly identical to the present one before this Court. *Cf. Manning v. Stigger*, 919 F. Supp. 249, 252 (E.D. Ky. 1996). Accordingly, the argument that the statute of limitations has been tolled is without merit.

As for her contention that her RICO cause of action is saved because she has alleged violation of laws up until at least 1994 by the defendants, this too is without merit. The Sixth Circuit has plainly rejected the last predicate act accrual method for determining when the statute of limitations begins to run. In *Agristor*, the Sixth Circuit emphasized that it would not adopt the rule that the accrual period would begin when the "'plaintiff knew or should have known of the last injury

or the last predicate act which is part of the same pattern of racketeering activity.'" *Agristor*, 967 F.2d at 241. The court noted that such method "conflicts with public policy" in that "in certain cases where the illegal activity is allegedly continuous, [as in this case], the statute of limitations will never begin to run." *Id.*

Instead, the Sixth Circuit has adopted the *Bivens* rule, as set forth previously. *Caproni*, 15 F.3d at 619-620; *Agristor* 967 F.2d at 241. That said, the plaintiff's RICO claim obviously is time-barred by the four-year statute of limitations.

The defendants have raised other issues in their motion to dismiss, e.g. the complaint does not allege predicate acts sufficient to state a claim, abstention, etc. However, because the Court has disposed of this matter with regards to the statute of limitations, the Court need not address such issues.

B. Plaintiff's Breach of Fiduciary Duty Claim

Supplemental jurisdiction over state law matters is granted to federal courts pursuant to 28 U.S.C. § 1367. Section 1367(c)(3) states that a federal district court may decline to exercise supplemental jurisdiction where "the district court has dismissed all claims over which it has original jurisdiction." Such is the case here, and thus the Court has the discretion to choose whether to decide the remaining claims. *See Jones v. City of Carlisle, Kentucky*, 3 F.3d 945, 951 n.6 (6th Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994).

The Sixth Circuit has emphasized, "when all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to the state court if the action was removed." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996). Thus, absent compelling reasons, a federal district court sitting in the Sixth Circuit generally will not retain jurisdiction, but will dismiss or remand any pending state law claims.

In the case at hand, the Court can find no compelling reasons or unusual circumstances to retain jurisdiction and decide the purely state law issues, especially when such state law issues have already been presented to two state circuit courts. Accordingly, since the plaintiff cannot invoke the Court's diversity jurisdiction and because the Court has dismissed the federal cause of action, the Court will decline to exercise its supplemental jurisdiction over the pendent state claim.

III. Motion for Contempt

On March 10, 1997, the Court ordered the plaintiff to pay the Receiver's costs. The plaintiff, however, moved the Court to alter or amend its ruling. In its Order entered July 21, 1997, the Court denied that motion and ordered the plaintiff to pay the Receiver's costs immediately.

The Receiver now comes forward, moving the Court to hold the plaintiff in contempt for failure to pay said costs as ordered. The plaintiff has responded, stating that she has depleted the assets of the estate and that she cannot obtain a loan. She suggests that the Court direct AOC to reissue certain

shares of A0C stock, which the plaintiff owns, to the Receiver.

The defendants, however, object to such remedy, stating that Fed. R. Civ. P. 70 does not apply because the Court has never issued a final judgment. Moreover, the defendants submit that the shares the Receiver requests, and that the plaintiff agrees to transfer, are involved in this litigation, and would possibly subject the defendant "to more litigation by a stranger in new forums." Thus, the defendants strenuously object to this remedy.

Although it is clear that the plaintiff has failed to pay the Receiver, the Court must determine, first, whether the plaintiff should be held in contempt and, second, what the best possible solution is to ensure that the Receiver is compensated. Accordingly, the Court will schedule a hearing in order to resolve this matter.

Having resolved the various motions in this matter,

IT IS ORDERED:

(1) that the defendants' motion to dismiss [Record No.31] the claims against them, be, and the same hereby is, **GRANTED**; the plaintiff's RICO claim, Count I, be, and the same hereby is, **DISMISSED WITH PREJUDICE** and the plaintiff's state law breach of fiduciary duty claim, Count II, be, and the same hereby is, **DISMISSED WITHOUT PREJUDICE.**

(2) that the defendants' motion to transfer [Record No. 33] be, and the same hereby is, **DENIED AS MOOT**, since the action has been dismissed as against them.

(3) that the plaintiff's motion for leave to file her response out of time [Record No. 66] be, and the same hereby is, **GRANTED.**

(4) that the defendants' motion to strike [Record No. 69] the plaintiff's motion to file her response out of time be, and the same hereby is, **DENIED.**

(5) that the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 4l(b) [Record No. 70] be, and the same hereby is, **DENIED AS MOOT**, as the action has been dismissed on the merits.

(6) that the Receiver's motion to hold the plaintiff in contempt and to enter judgment for specific acts pursuant to Fed. K. Civ. P. 70 [Record No. 63] be, and the same hereby is, **SET FOR A HEARING** on Friday, September 5, 1997, at 1:00 p.m. in Frankfort, Kentucky.

This the 29th day of August, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: September 2, 1997

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

[September 24, 1997]

No. 97-72

DOTTIE RENEE MCALPIN, of Lexington, Kentucky, Individually as ADMINISTRATRIX OF THE ESTATE OF ROBERT MOCK and as a Shareholder on Behalf of APPALACHIAN OIL CORPORATION, a Kentucky corporation,

Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., a Kentucky corporation, MARIE MILLS, ADMINISTRATRIX OF THE ESTATE OF VANCE MILLS, BECKMAN GARLAND, APPALACHIAN OIL CORPORATION, a Kentucky corporation, G & M OIL

COMPANY, INC., a Kentucky)
corporation, B & V REALTY)
CORPORATION,)
Defendants.)
)

AGREED ORDER OF DISMISSAL WITH PREJUDICE

The parties being in agreement and the Court being otherwise sufficiently advised that the parties hereto have settled their disputes,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That the Complaint filed herein is DISMISSED AS SETTLED WITH PREJUDICE TO ALL CLAIMS asserted therein and this action is Ordered stricken from the docket of this Court in its entirety.

2. That this Court's Order of August 29, 1997 is hereby amended to provide that Count II of the Complaint is Dismissed with Prejudice.

3. That the Court appointed Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants, any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents which he may have obtained or generated as the

result of the performance of his duties as Receiver herein.

4. That the parties shall bear their own costs and expenses herein.

It is so ordered, this the 24th day of September, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

HAVE SEEN AND AGREED:

/s/_____
Douglas C. Brandon, Esq.
112 North Upper Street
Lexington, KY 40507
Attorney for the Plaintiff

/s/_____
Gregory P. Parson, Esq.
Stites and Harbison
2300 Lexington Financial Center
Lexington, KY 40507
Attorney for the Court Appointed Receiver, Morris Gahafer

/s/_____
Gary W. Napier, Esq.
400 South Main St.
P.O. Drawer 5087
London, KY 40745-5087
Attorney for the Defendants

/s/_____
Clerk's Initials Date

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed January 14, 1999]

Civil Action No. 97-72

DOTTIE RENEE MCALPIN,
Plaintiffs,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., ET AL.,
Defendants.

ORDER

This matter is before the Court on Defendants' motion to re-open the above-styled action for the limited purpose of enforcing the Court's Orders and the terms of the settlement agreement entered into on September 24, 1997 [Record No. 88]. The plaintiff has responded [Record No. 96], and has filed a correction to said response [Record No. 97]. The defendants have replied [Record No. 99]. A response was also filed by the receiver who had previously been appointed

by this Court [Record No. 101]. Both the plaintiff and the defendants have moved for oral argument on this matter [Record Nos. 99, 102]. This matter is now ripe for decision.

Plaintiff aries that this Court lacks jurisdiction to grant Defendants' requested relief based on *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375 (1994).[1] While *Kokkonen* does in some ways limit the Court's jurisdiction in voluntary dismissal cases with regard to enforcement of a settlement agreement, the Supreme Court noted that Fed. R. Civ. P. 60(b) (6) permits the district court to re-open a case for "any other reason justifying relief". Therefore, this Court has the power to grant the defendants' relief in this matter.

Accordingly,

IT IS ORDERED:

(1) That Defendants' motion be, and the same hereby is, **GRANTED**;

(2) That Plaintiff is hereby held in contempt;

(3) That Plaintiff is hereby directed to transfer to the defendants, any and all documents relevant to Appalachian

---

[1] *Kokkonen* held that a district court lacks jurisdiction to enforce a settlement agreement in some instances where jurisdiction was not retained specifically by the Court in the Fed. R. Civ. P. 41(a) Order dismissing the suit.

Oil Corporation and /or any and all documents upon which a claim against the defendants could be based;

(4) That Plaintiff must delete any and all claims that Robert Mock owned any shares of Appalachian Oil Corporation in Plaintiff's malpractice complaint pending in state court;

(5) That Defendants be, and the same hereby are, awarded all attorney costs and expenses generated in their enforcement of the settlement agreement;

(6) That all requests for oral argument be, and the same hereby are, **DENIED**.

This is the 14th day of January, 1999.

/s/_____

Date of Entry and Service: January 15, 1999

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed December 1, 2000]

Civil Action No. 97-72

DOTTIE RENEE MCALPIN,
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., ET AL.,
Defendants.

ORDER

This matter is before the Court upon an Order of the Sixth Circuit Court of Appeals dated October 3, 2000, reversing the judgment of this Court holding Plaintiff McAlpin in contempt and remanding the case back to this Court [Record No. 136].

In accordance with said opinion, this Court determines that Plaintiff McAlpin was required to return all documents

and copies of documents seized during Gahafer's receivership pursuant to this Courts Orders dated March 10, 1997 and dated September 24, 1997 [Record Nos. 24, 60, 85].

Accordingly, **IT IS ORDERED**, that Plaintiff McAlpin turn over all documents and copies of documents seized during Gahafer's receivership to the defendant's **IMMEDIATELY.**

This the 1st day of December, 2000.

/s/_____
JOSEPH M. HOOD, JUDGE

Date of Entry and Service December 4, 2000

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

[Filed March 17, 1997]

Pikeville Civil Action No. 97-72

DOTTIE RENEE McALPIN, Individually, and as Administratrix of Estate of Robert T. Monk, Et Al.
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., ET AL.,
Defendants.

March 4, 1997
4:00 p.m.

HEARING ON MOTION FOR PRELIMINARY INJUNCTION TRANSCRIPT OF HEARING PROCEEDINGS BEFORE HONORABLE JOSEPH M. HOOD UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Douglas C. Brandon, Esq. Patrick F. Nash, Esq. 401 W. Main Street Lexington, Kentucky 40507
For the Defendant:	Thomas L. Jensen, Esq. Gary W. Napier, Esq. Timothy J. Walker, Esq. 400 S. Main Street London, Kentucky 40745
For the Receiver, Morris Gahafer:	Gregory P. Parsons, Esq. Stites & Harbison Lexington Financial Center Lexington, Kentucky 40507
Court Reporter:	Kathryn E. Marshall 330 W. Broadway Frankfort, Kentucky 40601 (502) 223-3626

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: Madame Clerk, call the matter on for hearing, please.

CLERK: Yes, Your Honor. Pikeville Civil Action No. 97-72, Dottie Renee McAlpin, Individually, and as Administratrix of the Estate of Robert T. Monk, et al. versus Lexington 76 Auto Truck Stop, Inc., et al. This matter

being being called for motion for preliminary injunction, Your Honor.

THE COURT: For the purposes of the record, please state your appearances.

MR. BRANDON: Douglas Brandon and Patrick Nash for the plaintiff.

THE COURT: Mr. Brandon, Mr. Nash.

MR. JENSEN: Your Honor, Tom Jensen on behalf of the defendants along with Gary Napier and Tim Walker.

THE COURT: Good to see you all. Haven't seen you all in awhile.

MR. PARSONS: Your Honor, Greg Parsons on behalf of Morris Gahafer, the Court's receiver.

THE COURT: Mr. Parsons. This matter, as everyone well knows, the plaintiff has filed a suit on behalf of herself and other shareholders of Appalachian Oil Corporation. She claims that the defendants have breached their judiciary duties to the plaintiffs and violated the RICO statute. After considering . . . .

MR. PARSONS: (p. 20). . . . some reason to the people who were there. They saw it or whatever. One of the other individuals did have a knife that he simply used that knife to open a box that was sealed.

THE COURT: Mr. Parsons, I know you're from Harlan, Kentucky and you know knives come in various shapes, forms and sizes? How big was this knife?

MR. PARSONS: Your Honor, I do not know. I'd have to ask Mr. Gahafer.

THE COURT: Was it a serrated edge Swiss Army knife suitable for inflicting wounds and things like that?

MR. PARSONS: I would have to ask Mr. Gahafer.

MR. GAHAFER: Sir, I just briefly saw the knife. The one concealed weapon was not carried by my brother. The other gentleman was also an off duty metro policeman. He apparently had his weapon on. My brother did not. Both of them did have knives. Their knives were carried in pocket. I saw one of the knives out open and essentially cutting some stripping on the legal packed boxes and then he put the knife up.

THE COURT: Okay. Go ahead Mr. Parsons.

MR. PARSONS: Your Honor, Mr. Gahafer did not conduct what has been characterized as array. He was met with some resistance from the employees there, and I believe the Marshal did remind them that he had authority to handcuff if they did not cooperate with the Court's order, but it was not done in the style that was related to the Court. I'm sure the defendants were upset and surprised by this, but Mr. Gahafer's sole objective was to get control of the records which he believed he was directed to do by the Court,

attempted to review those records, get a handle on what the assets of this corporation were and report to the Court regarding what he found. Of course, he's only had ten days in which to do that and he's worked three months night and day to try to get that done to report to you today.

On Monday, the Monday after Mr. Gahafer began to receive these records on Friday, I was contacted by the defendant's counsel. He expressed to me concern about whether or not the receiver had the authority to seize records and do what he had been doing. At that point, because of his concerns, I made an effort to contact the Court through the Court's secretary to seek a conference call so that the defendant's concerns could be addressed and any duties of the receiver be clarified so that he could get on with those duties and report back to the Court.

We did contact the Court's office and we were told by your secretary that we were to contact plaintiff's counsel for further direction. That's what we did. We contacted Mr. Brandon and we received a letter from him giving us a little bit more specific guidance as to what Mr. Gahafer was to do He then set about the task of doing that . . . .

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CIVIL MINUTES - GENERAL
PIKEVILLE
AT FRANKFORT

[Filed March 6, 1997]

No. 97-72

DOTTIE RENEE MCALPIN, ETC, ET AL., *Plaintiffs*,	)
v.	)
LEXINGTON 76 AUTO TRUCK STOP, INC., ET AL., *Defendants*,	)

March 6, 1997

PRESENT:

HON. JOSEPH M. HOOD, JUDGE

/s/_____ /s/_____
Court Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Douglas C. Brandon
Greg Parsons on behalf of receiver

ATTORNEYS PRESENT FOR DEFENDANTS:

Gary W. Napier
Time Walker

PROCEEDINGS: HEARING ON MOTION FOR PRELIMINARY INJUNCTION

This matter was called for proceeding with counsel present as noted. The Court having heard counsel and being advised that the receiver has not prepared a balance sheet due to the fact of not being able do interviews with certain employees and the plaintiffs having failed to obtain a bond in this matter, accordingly,

IT IS ORDERED herein as follows:

1) The Temporary Restraining Order is hereby DISSOLVED.

2) Plaintiffs' motion for preliminary injunction is hereby DENIED.

3) Receiver's motion for approval of payment of costs is hereby GRANTED, and said costs are hereby taxed to the plaintiffs.

4) On oral motion of the defendants, the receiver shall return all documents taken from the defendants' premises forthwith. The receiver shall not copy or disclosed any document or portion thereof to anyone and if copies were made they are to be returned to Mr. Greg Partsons, who in turn will return them to the defendants.

5) When all defendants in this action have filed answers to the complaint, the Clerk shall send out the Court's general order and the case will proceed accordingly.

This 6th day of March, 1997.

/s/_____
JOSEPH M. HOOD, JUDGE

Initials of Deputy Clerk _____

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

[Filed June 18, 1998]

Docket No. CV 97-72

DOTTIE RENEE MCALPIN, IND.)
AND AS ADMINISTRATRIX OF)
THE ESTATE OF ROBERT T.)
MONK, ET AL.,)
Plaintiffs,)
)
v.)
)
LEXINGTON 76 AUTO STOP,)
INC., ET AL.,)
Defendants.)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOSEPH M. HOOD
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Mr. Douglas C. Brandon

For the Defendant: Messrs. Gary W. Napier and Greg Parsons

Court Reporter: K. Ann Edgington Banta, RPR
330 W. Broadway
Frankfort, KY 40601
(502) 223-3626

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

MR NAPIER: (p.8) . . . based on my analysis of the case, I don't see that based on the merits, Your Honor.

So we retabled our offer of $75,000 again to show good faith and today they asked to talk for the first time. So I guess we were kind of surprised at their interest in doing that.

THE COURT: Well, I think it's - - to be honest, Mr. Napier, I am looking at a situation where the plaintiff is looking at an order which says that the case is to be dismissed.

Now, granted there is a motion for reconsideration. You know, the validity of that is based on something that I don't see pled in the complaint. In any form. I see it's mentioned in there, but there is only one cause of action; but that's for the RICO statute, RICO violation: So $75, 000 under those circumstances is probably not a bad offer.

MR. NAPIER: We thought it was, Your Honor.

THE COURT: But I don't see the 170, to be honest with you, Mr. Brandon. I mean, this - - litigation's been pending in one form or fashion, in one form or another, since 1983. The allegations that are made in this complaint were well known in 1983 and in 1986 when the various state actions were brought.

Assuming, and I think the most recent decisions of the Sixth Circuit, and the United States Court of - - Supreme Court would have that - - the RICO matter is of no substance because of the Statute of Limitations.

The argument being is that there is a savings matter, the Robinson-Patton matter, I think it is. But we look at certain things, and I look at 1986, 1983, and that these have been going on since that time.

The most important thing about that is that people have died in the interim. People are prejudiced. They cannot defend certain things because the people who knew what happened at that time are deceased.

Latches is a defense that - - even if Robinson-Patton survived any form of the RICO analysis or any form of the Statute of Limitations, there is a very applicable defense to that, that is the Latches defense; and I would be concerned about that.

So I think $170, 000 is - - is far too much of a demand. I think the $75, 000 might be - - might be fair. But it could come up. You know, do you want to keep litigating this? You still got matters pending in Kentucky Supreme Court.

MR. NAPIER: That's really the basis of the offer, Your Honor, is we would like to - -

THE COURT: Well, close it out and get it over and buy your peace . . . .

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

[Filed February 24, 1997]

No. 97-72

DOTTIE RENEE MCALPIN, ADMINISTRATRIX OF THE ESTATE OF ROBERT MOCK,
Plaintiff,

v.

LEXINGTON 76 AUTO TRUCK STOP, INC., MARIE MILLS, EXECUTRIX OF THE ESTATE OF VANCE MILLS, BECKHAM GARLAND, APPALACHIAN OIL CORPORATION, G & M OIL CORPORATION, G & M OIL COMPANY, INC., AND B & V REALTY CORPORATION,
Defendants.

AFFIDAVIT

Comes the Affiant, Phil Scharr, and after having been duly sworn states as following:

1. My name is Phil Scharr and I am employed by G & M Oil Company, Inc.

2. On Friday, February 21, 1997, while in the office of G & M Oil Company, Inc. I was served with a copy of a Temporary Restraining Order in this case.

3. The temporary restraining order was served by an individual who identified himself to be a federal marshall.

4. Mr. Morris Gahafer accompanied the federal marshals to the offices of G & M Oil Company, Inc. Mr. Gahafer described his occupation as that of a "forensic accountant."

5. I requested to be able to call Mr. Jerry Garland, who is now responsible for the day-to-day operations of G & M Oil Company, Inc. and Appalachian Oil Corporation and asked the marshals if they could wait "an hour or so" while Mrs. Marie Mills and Mr. Garland attended the funeral of Mr. Kale Mills, Vance Mills' father.

6. In response to that request, one of the federal marshall's advised that he had some "fancy jewelry" for me in his back pocket and that I would either cooperate or that they would "take [me] to London."

7. I was further advised that if anyone on the premises failed to cooperate they would be an "accessory."

8. Mr. Gahafer left the premises of G & M Oil Company, Inc. and Appalachian Oil with a van load of records.

Further, the affiant sayeth naught.

/s/_____
PHIL SCHARR

STATE OF [KENTUCKY])
)
COUNTY OF [KNOX])

Personally appeared before me the undersigned authority, a Notary Public in and for said County and State, duly commissioned and qualified, PHIL SCHARR with whom I am personally acquainted and who, upon oath, acknowledged himself to be [Environmental Safety Manager] of G & M Oil Company, Inc. and further acknowledged that he executed the within instrument as such with full authority to do so, for the purposes therein contained and did further state that all matters set forth therein are true and correct.

WITNESS my hand and official seal of office, this 24th day of February, 1997.

/s/_____
NOTARY PUBLIC

My Commission Expires: 11/29/98

APPENDIX N

List of cases citing *Kokkonen v. Guardian Life Insurance Company of America*, 114 S. Ct. 1673, 511 U.S. 375 (1994)

Bell v. Schexnayder, 36 F.3d 447, 94 Ed. Law Rep.725 (5th Cir.(La.) Oct. 27, 1994)

Baer v. First Options of Chicago, Inc., 72 F.3d 1294 (7th Cir.(Ill.) Dec. 27, 1995)

Board of Trustees of Hotel and Restaurant Employees Local 25 v. Madison Hotel, Inc., 97 F.3d 1479, 321 U.S.App.D.C. 145 (D.C.Cir. Oct. 15, 1996)

Mullins v. City of Griffin, 886 F.Supp. 21 (N.D.Ga. Jan. 6, 1995)

Ortolf v. Silver Bar Mines, Inc , 111 F.3d 85 (9th Cir.(Idaho) Apr. 14, 1997)

Bass v. Denney, 1998 WL 59486 (N.D.Tex. Feb. 9, 1998)

Consolidation Coal Co. v. U.S. Dept. of Interior, 43 F.Supp.2d 857 (S.D.Ohio Mar. 25, 1999)

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In re Phar-Mor, Inc. Securities Litigation, 172 F.3d 270 (3rd Cir.(Pa.) Mar. 30, 1999)

McAlpin v. Lexington 76 Auto Truck Stop, Inc., 229 F.3d 491 (6th Cir.(Ky.) Oct. 3, 2000)

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O'Connor v. Colvin, 70 F.3d 530 (9th Cir.(Cal.) Nov. 1, 1995)

In re Hunter, 66 F.3d 1002 (9th Cir. Sep. 27, 1995)

Morris v. City of Hobart, 39 F.3d 1105 (10th Cir.(Okla.) Nov. 4, 1994)

In re T2 Medical, Inc., 130 F.3d 990 (11th Cir.(Ga.) Dec. 8, 1997)

National Presto Industries, Inc. v. Dazey Corp., 107 F.3d 1576 (Fed.Cir.(Ill.) Mar. 6, 1997)

Faust v. U.S., 101 F.3d 675 (Fed.Cir. Nov. 26, 1996)

York v. County of El Dorado, 119 F.Supp.2d 1106 (E.D.Cal. Oct. 16, 2000)

Tellez v. U.S. I.N.S., 91 F.Supp.2d 1356 (C.D.Cal. Feb 14, 2000)

National Presto Industries, Inc. v. Dazey Corp., 1994 WL 675125 (N.D.Ill. Nov 29, 1994) (NO. 90 C 6614)

Smith v. Martin, 1994 WL 529325 (N.D.Ill. Sep. 27, 1994)

Hertenstein v. Kimberly Home Health Care, Inc., 69 F.Supp.2d 1341 (D.Kan. Sep. 14, 1999)

Briggs v. Goodyear Tire & Rubber Co., 79 F.Supp.2d 228 (W.D.N.Y. Dec 14, 1999)

Lane v. Birnbaum, 910 F.Supp. 123 (S.D.N.Y. Dec. 11, 1995)

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Parigian v. LeBlanc, 134 F.3d 361 (1st Cir.(Mass.) Jan. 6, 1998)

Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315 (5th Cir.(Tex.) June 10, 1997)

Beggerly v. U.S., 114 F.3d 484 (5th Cir.(Miss.) May 29, 1997)

Neuberg v. Michael Reese Hosp. Foundation, 123 F.3d 951 (7th Cir.(Ill.) July 29, 1997)

Matter of VMS Securities Litigation, 103 F.3d 1317 (7th Cir.(Ill.) Dec. 31, 1996)

Lucille v. City of Chicago, 31 F.3d 546 (7th Cir.(Ill.) Aug. 3, 1994)

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Buster v. Greisen, 104 F.3d 1186 (9th Cir.(Alaska) Jan. 16, 1997)

Matter of Requested Extradition of Kirby, 106 F.3d 855 (9th Cir.(Cal.) Dec. 16, 1996)

Arata v. Nu Skin Intern., Inc., 96 F.3d 1265 (9th Cir.(Cal.) Sep. 25, 1996)

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Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir.(Or.) Mar. 13, 1995)

Consumers Gas & Oil, Inc. v. Farmland Industries, Inc., 84 F.3d 367, (10th Cir.(Colo.) May 17, 1996)

Karstens Products, Inc. v. F.D.I.C.,74 F.3d 125 (Fed.Cir.(Mass.) Dec. 19, 1995)

Foretich v. American Broadcasting Companies, Inc., 198 F.3d 270, 339 U.S.App.D.C. 98 (D.C.Cir. Dec. 28, 1999)

Hornady Truck Line, Inc. v. Volvo Trucks No. Amer., 2000 WL 1137203 (S.D.Ala. July 18, 2000)

Riley v. Fisher, 2000 WL 827935 (S.D.Ala. June 7, 2000)

Cremeens v. City of Montgomery, 54 F.Supp.2d 1249 (M.D.Ala. June 28, 1999)

ALFAB, Inc. v. CNA Financial Corp., 877 F.Supp. 1538 (M.D.Ala. Jan. 26, 1995)

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Neuberg v. Michael Reese Hosp. and Medical Center, 166 F.R.D. 398 (N.D.Ill. May 3, 1996)

National Presto Industries, Inc. v. Dazey Corp., 1995 WL 35394 (N.D.Ill. Jan. 27, 1995)

O'Leary v. Fanghella, 866 F.Supp. 1119 (N.D.Ill. Nov 02, 1994)

U.S. ex rel. Coleman v. State, 2000 WL 1357791 (S.D.Ind. Sep. 19, 2000)

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Solv-Ex Corp. v. Quillen, 1999 WL 311808 (S.D.N.Y. Apr. 29, 1999)

Diaz v. Loews New York Hotel, 1998 WL 326736 (S.D.N.Y. June 18, 1998)

U.S. v. Weissman, 1997 WL 334966 (S.D.N.Y. June 16, 1997)

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Sweeney v. City of Dayton, 1994 WL 1655234 (S.D.Ohio July 29, 1994)

Minnesota Corn Processors, Inc. v. McCormick, 2000 WL 948659 (E.D.Pa. July 7, 2000)

Jeandron v. Applebaum, 1998 WL 54438 (E.D.Pa. Jan. 28, 1998)

Rivers v. Consolidated Rail Corp., 1997 WL 430996 (E.D.Pa. July 23, 1997)

Home Corp. v. deLone, 1997 WL 214849 (E.D.Pa. Apr. 23, 1997)

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